IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1354

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

ARISTEDES A. DAY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Trans World Airlines, Inc. ("TWA"), prays for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit entered in these proceedings on December 22, 1975.[1]

Opinions Below

The opinion of the court of appeals appears at pages 3-18 of the separate appendix ("App.") and is reported at 13 Avi. 18,144. The opinion of the district court appears at App. 21-32 and is officially reported at 393 F. Supp. 218.

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[1] Additional respondents are Theodora Day and Constantine Day, in 73 Civ. 4105 (CLB); Kate Kersen, in 74 Civ. 3355 (CLB); and John Spiridakis, Bessie Spiridakis, Leonard Lazarus and Shirley Lazarus, in 74 Civ. 4191 (CLB).

Jurisdiction

The judgments of the court of appeals were entered on December 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Warsaw Convention,[2] a Treaty of the United States relating to international transportation by air, as modified by the Montreal Agreement,[3] impose absolute liability on an air carrier for injuries to persons inside a terminal building, far removed from the operation of aircraft?

2. In interpreting a multilateral treaty debated and drafted in French, one of the stated purposes of which is to achieve uniformity of law, should a court give great weight to a recent French decision affirmed by the Supreme Court of France interpreting the same phrase of the treaty in issue, as well as to decisions of American courts?

3. Where the legislative history of a treaty drafted in 1929, and redrafted in 1971 with no change in the language in issue, evidences the intent of the parties, may a court frustrate that intent by invoking a policy of its own predilection?

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929. Adherence by the United States was declared June 27, 1934, and became effective October 29, 1934. 49 Stat. 3000; T.S. 876 ("Warsaw Convention", "Convention", or "Treaty").

[3] An agreement of air carriers made with the approval of the Civil Aeronautics Board. C.A.B. Agreement 18900, Order E-23680, May 13, 1966.

Treaty Involved

Article 17, the provision of the Warsaw Convention involved, is set forth in the separate Appendix (App. 1), in both the official French and the U.S. government translation. Article 17 provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place *on board the aircraft or in the course of any of the operations of embarking or disembarking*" (emphasis added).

Statement

Respondents sued to recover damages for wrongful death and personal injuries sustained when on August 5, 1973, two Palestinian terrorists, who were not prospective TWA passengers, threw hand grenades and shot at prospective passengers waiting inside the International Transit Lounge of Hellenikon Airport in Athens, Greece. While most of the persons injured were prospective passengers of petitioner TWA, a prospective passenger of at least one other airline was killed and an undetermined number of prospective passengers and employees of other airlines were injured (R-73a, 85).[4]

Respondents had submitted their tickets, checked their baggage and passed through Greek passport inspection. They then descended into the International Transit Lounge where they could patronize a bar or duty-free shops or sit in any part of this large room shared by 40 international

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[4] References preceded by "R" refer to pages of the record contained in the appendix submitted to the Second Circuit.

airlines.[5] No area within the Transit Lounge is reserved for the exclusive use of prospective passengers of any particular airline (R-86). When their flight was called, they lined up in front of Gate 4 to participate in a carry-on baggage and physical search by Greek authorities (R-84). It was at this place in the terminal that the terrorist attack took place.

Had the attack not occurred, respondents would have proceeded through the Greek carry-on baggage and physical search and then walked to a double set of exit doors opening onto a raised terrace. They would have walked out onto the terrace and down a set of stairs onto a roadway at the level of the traffic apron[6] and runway. From there, an Olympic Airways bus would have taken them to the plane, a distance of approximately 250 meters (R-79, 87c). When the bus stopped near the aircraft, respondents would have left the bus, walked to the plane and up the boarding ladder.

Development of the Warsaw Convention

The Warsaw Convention, debated and drafted in French, was written in 1929 and adhered to by the United States in 1934. The purposes of the Convention were to provide uniform rules of recovery for passengers and shippers throughout the world and to limit the liability of air carriers for international transportation. *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968). It created a presumption that the airline was liable, shifting the burden of proof onto the airline to prove freedom from fault, and limited liability to passengers to approximately $8,300.

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[5] The floor plan of the International Transit Lounge, shared by 40 airlines, is set forth in App. 94.

[6] The traffic apron or tarmac is the paved roadway on which aircraft are parked or taxi to the runways.

A diplomatic conference was held at The Hague in 1955 to formally amend the Warsaw Convention. Among other amendments the resulting Hague Protocol raised the limit of liability to $16,600. While the Hague Protocol is in effect in over 45 nations, including Canada, France and the Soviet Union, it was never ratified by the United States.

Dissatisfied with the low limit of liability, the United States formally denounced the Warsaw Convention in 1965 with cancellation to take effect in six months. Prior to the scheduled cancellation date most international airlines entered into the Montreal Agreement which was approved by the Civil Aeronautics Board. The carriers were, of course, aware that they could not change by private agreement the applicability of the Convention, but pursuant to Article 22(1) of the Convention which permitted special agreements of "a higher limit of liability," the airlines agreed to increase the monetary limit to $75,000 and to waive the defense of due care, thereby accepting the concept of absolute liability for accidents falling within the scope of the Treaty. The United States thereupon withdrew its denunciation of the Warsaw Convention which thus continued in all other respects to bind this nation.

The latest development of the Warsaw Convention is the Guatemala Protocol of 1971. Representatives of 55 countries formally amended the Warsaw Convention and the Hague Protocol. They adopted from the Montreal Agreement the concept of absolute liability, raised the limit of liability to $100,000, and added an escalator clause. In addition, a Supplemental Compensation Plan of an additional $200,000 was added allowing for recovery, in absolute liability, for a total of $300,000 per passenger. The drafters of the Guatemala Protocol did make changes to the language of Article 17 of the Warsaw Convention, but they kept the identical phrase at issue here, "any of the operations of embarking or disembarking" (Lowenfeld, Aviation Law § 6.2, and Documents Supplement,

p. 438 (1972)). The Guatemala Protocol has been signed by the United States and the Executive plans to send it to the Senate for their advice and consent. The interpretation of this clause of the Treaty, therefore, is timely and important.

The Proceedings Below

Respondents brought their actions in the United States District Court for the Southern District of New York invoking the federal question and/or diversity jurisdiction of the court. 28 U.S.C. §§ 1331, 1332. The complaints alleged that TWA was negligent and, alternatively, that TWA was absolutely liable, regardless of fault, pursuant to the Convention as modified by the Montreal Agreement. Moving for partial summary judgment on the issue of absolute liability, respondents claimed that TWA was absolutely liable for their injuries even though they were still inside of the Greek government owned and operated terminal building at the time of the terrorist attack (R-82).

TWA also moved for partial summary judgment.[7] TWA cited the legislative history of the treaty including the minutes, the later stated views of three delegates to the convention, as well as the writings of many other authorities in the field. Domestic and foreign cases were cited including one directly in point affirmed by the highest court in France, *Maché* v. *Air France* (App. 59-64).

The district court held, however, that "the plain meaning of the words in the course of any of the operations of embarking produces a single conclusion" (393 F. Supp. at 221, App. 27). It candidly based its decision on its own

[7] The motions for partial summary judgment were confined to the scope of Article 17 of the Warsaw Convention. Plaintiffs' claims in negligence were not involved.

economic philosophy that the costs of this terrorist incident could best be borne by the airline, particularly since the carrier could buy insurance (App. 25). The district court "readily" distinguished the American precedents as involving disembarking as opposed to embarking, and did not mention the *Maché* case (App. 30). It issued a certificate pursuant to 28 U.S.C. § 1292(b), and an interlocutory appeal followed.

While the certified appeal in *Day* was pending in New York, the United States District Court for the Western District of Pennsylvania decided *Evangelinos* v. *Trans World Airlines, Inc.*, 396 F. Supp. 95 (W.D. Pa. 1975) (App. 33-49). *Evangelinos* arose out of the same terrorist incident as *Day* and was decided on substantially similar papers. Judge Snyder, in *Evangelinos*, discussing the district court's opinion in *Day* stated:

> "The great difficulty with Judge Brieant's opinion . . . is that it extends the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties. This the Court does not feel justified in doing" (396 F. Supp. at 192, App. 46-47).

Without mentioning *Evangelinos*, which was briefed and argued on the appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's order in *Day*. While paying lip service to a court's duty to " 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties' " (App. 12), its decision was, in fact, based on the "deep pocket" theory, finding that TWA could more easily bear the expenses of the "accident." It found that its construction was "in harmony with modern theories of accident cost allocation" (App. 9). The court of appeals did not refer to *Maché*, affirmed by the Supreme Court of

France. Although it found the Montreal Agreement of 1966 (App. 13) and the Guatemala Protocol of 1971 (App. 15, n. 15) significant, the court of appeals did not discuss the fact that the Guatemala Protocol made no change in the language of Article 17 at issue here.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions of the First Circuit Court of Appeals and the Supreme Court of France.

The "Warsaw Convention is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties . . ." (Lowenfeld, Aviation Law § 4.1). As Judge Wisdom described the Convention, it is "rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible" (*Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968)). It should be given its "'proper status as a treaty obligation of our nation without equivocation'" (*Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798, 801 (2d Cir. 1971)).

Chief Judge Kaufman's decision in *Day* is substantially in conflict with the decision of the First Circuit in *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971); in direct conflict with the decision of the French Supreme Court in *Maché* v. *Air France* (App. 59-64) and the decision of Judge Gignoux, *In Re Tel Aviv* (D.P.R. 1975) (App. 50-57); and indistinguishably in conflict with *Evangelinos* v. *Trans World Airlines, Inc.,* 396 F.Supp. 95 (W.D. Pa. 1975) (App. 33-49), which arose out of the same terrorist incident as *Day* and which was decided on substantially similar papers. Oral argument was heard by

the Third Circuit in *Evangelinos* on February 3, 1976, and the parties are awaiting a decision.[8]

In *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971), the plaintiff had mysteriously fallen inside the terminal building after getting off her plane but before her daughter had picked up their baggage or before they had gone through customs. Chief Judge Aldrich held that any of the operations of disembarking has

> "terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal . . ." (439 F.2d at 1405).

In addition, Chief Judge Kaufman's decision in *Day* is directly in conflict with *Maché* v. *Air France*[9] affirmed by the Supreme Court of France. In *Maché,* plaintiff was being led by two Air France stewardesses from the plane to the terminal building. They crossed the traffic apron and continued on to an area called the customs garden on

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[8] Other decisions in conflict with that of Judge Kaufman are: *Fclismina* v. *Trans World Airlines, Inc.,* 13 Avi. 17,145 (S.D.N.Y. 1974) (App. 58) (Embarking or disembarking terminates when a passenger walks through an expandable, horizontal jetway which leads from the airplane door to the terminal proper); *Klein* v. *KLM Royal Dutch Airlines,* 46 App. Div.2d 679, 360 N.Y.S.2d 60 (2d Dep't 1974) (Embarking or disembarking terminates when a passenger "arrives safely within the terminal . . .").

[9] *Maché* v. *Air France,* [1967] Revue Française de Droit Aérien 343 (Cour d'Appel de Rouen 1967), *aff'd,* [1970] Revue Française de Droit Aérien 311 (Cour de Cassation 1970). The trial court had held the Warsaw Convention applied, [1961] Revue Française de Droit Aérien 283 (Tribunal de Grande Instance de la Seine 1961). The Court of Appeals of Paris affirmed, [1963] Revue Française de Droit Aérien 353 (1963); the Court of Cassation, France's highest court, reversed and remanded to a different court of appeals as is their custom, [1966] Revue Française de Droit Aérien 228 (Cour de Cassation 1966). The Court of Appeals of Rouen, sitting *en banc,* rendered the decision discussed above which was then affirmed by the Court of Cassation in 1970.

their way to the terminal building. Before reaching the terminal building plaintiff was injured. Examining the *travaux préparatoires,* or legislative history, of this treaty debated and drafted in French, the Court of Appeals of Rouen held that the Warsaw Convention applies to accidents on the ground during operations of embarking or disembarking "only to the extent that these operations are taking place on the traffic apron . . ." (App. 62). On appeal the French Supreme Court affirmed. Once a passenger leaves the traffic apron, even though he has not yet entered the terminal building and even though he is being led by two Air France stewardesses, he has completed the operations of embarking or disembarking.[10]

Where uniformity of international law is a primary purpose of a multilateral treaty[11] a court should give great

[10] See also a lower court decision, *Forsius* v. *Air France,* [1973] Revue Française de Droit Aérien 216 (Tribunal de Grande Instance de Paris 1973) (App. 65-67) where plaintiff, just like respondents, was injured in the International Transit Lounge of Orly Airport after checking in and having passed through customs. The court held that she had not yet commenced any of the operations of embarking. But see *Blumenfeld* v. *BEA,* [1962] Z. Luft. R. 78 (Berlin Court of Appeals 1961) (App. 68-72), where plaintiff was injured outside of the terminal building on steps leading from the terminal to the traffic apron. The court held Warsaw applied but in *dicta* stated that "the air carrier already commits the flight passengers under his care when he requests them to go from the waiting room to the aircraft. . . . As there exists no absolute liability to the disadvantage of the air carrier according to the law, it cannot be unequitable to interpret the notion of 'embarking' in an expansive sense" (App. 70). In the case at bar, TWA is absolutely liable and so even on the basis of the German lower court's decision, Warsaw would not apply.

[11] That uniformity of international air law was the intention of the drafters of the Warsaw Convention cannot be denied. The minutes of the Convention are replete with statements of the various framers describing this goal. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw (R. Horner & D. Legrez transl. 1975) ("Warsaw Minutes").

(footnote continued on following page)

weight to interpretations of the highest courts of other adherents. See *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.,* 291 U.S. 138 (1934), where this Court looked to the interpretation of a treaty given by the Supreme Court of Canada.

The *Day* decision directly conflicts with recent decisions interpreting the identical legislative history in the context of terrorist incidents. On December 9, 1975, Judge Edward Gignoux, sitting in the District of Puerto Rico, decided *In Re Tel Aviv* (App. 50-57). The plaintiffs in that case flew into Lod Airport, Israel, descended the movable stairs and then walked or rode a bus to the terminal. Passing through Immigration they were in the baggage area awaiting the arrival of their baggage when two Japanese terrorists in the service of a Palestinian terrorist organization opened fire with hand grenades and submachine guns.

(footnote continued from preceding page)

Sir Alfred Dennis of Great Britain stated: "As regards the British Government, the sole reason which it has for entering into this Convention is the desire to achieve uniformity" (Warsaw Minutes at 35). "The draft of the Convention is contrary, on several points, to our laws and to our customs, but we have decided to make sacrifices to obtain this uniformity" (Warsaw Minutes at 35-36). Mr. Pittard of Switzerland stated: "That which we want to obtain is the harmony of laws" (Warsaw Minutes at 87). Mr. Ripert of France pointed out that "[w]e want to arrive at a unity of law in the interest of commercial transport" (Warsaw Minutes at 87). It was only in certain specified areas, where the use of local laws was specifically authorized, such as standing to sue and venue, Articles 21, 24(2), 25(1), 28(2) and 29(2), that the Convention allows any deviation from the rule of uniformity. In each such instance, however, specific reference is made authorizing the use of national law (Warsaw Minutes at 208-212). See Secretary of State Hull's letter to the President, recommending adherence to the Convention ([1934] U.S. Aviation Reports at 243). The Convention represents the only "widespread substantive achievement in the unification of private law by international agreement" (Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967). See also *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968). No nation should put itself above this international rule of law.

"From the time the passengers stepped out onto the movable stairs leading from the plane, all the facilities they used were owned and operated by the State of Israel or El Al, the Israeli National Airline, not by Air France" (App. 51). The *Tel Aviv* passengers' path, therefore, was precisely the same as respondents' in reverse. In Athens, all the facilities which respondents were using or would have used, the Athens terminal and the Olympic Airways bus, were owned and operated by the Greek government or Olympic Airways (R 82). Discussing the legislative history of the Warsaw Convention as well as the district court decisions in *Day* and *Evangelinos,* Judge Gignoux concluded:

> "The legislative history, however, makes clear that in drafting Article 17 the delegates to the Convention specifically intended to exclude from coverage accidents occurring to passengers inside an airport terminal building" (App. 54).[12]

The interpretation of the same treaty language has been or will be decided by three different circuits as well as by a number of foreign courts including the Supreme Court of France. The French Supreme Court has affirmed *Maché* which was decided in 1967. The First Circuit decided *MacDonald* in 1971 and will soon deal with the question again when it decides the interlocutory appeal from Judge Gignoux's decision, *In Re Tel Aviv.* In *Day,* the case at bar, the Second Circuit conflicted with the First and with the overwhelming worldwide authority on point. The Third Circuit heard oral argument in an identical case, *Evangelinos,* on February 3, 1976. Where uniformity of law is the purpose of the treaty, the departure of the Second Circuit from the previously established interpretation of the treaty language should not go uncorrected, if only to prevent inconsistent decisions within the United States.

[12] Judge Kaufman came to a very different conclusion from his review of the Warsaw Minutes.

II. The Decision Below Interjects Considerations Not Proper to Treaty Interpretation and Ignores the Intent of the Drafters.

The decision of the court below was in large part based on the court's own economic theories of accident cost allocation including the airline's ability to pay and spread the risk (App. 9-10). Such interpretation ignores the duty of courts to look " 'within the four corners of the Treaty' keeping in mind the purpose of the contracting parties." *American Trust Co.* v. *Smyth,* 247 F.2d 149, 153 (9th Cir. 1957). It is not the function of a court to change a treaty which it dislikes by the interjection of concepts foreign to the treaty. *The Amiable Isabella,* 19 U.S. [6 Wheat.] 1, 7 (1821).[13]

Rather the court must fully examine the legislative history of the treaty to ascertain the intent of the parties. *Choctaw Nation* v. *United States,* 318 U.S. 423, 431-32 (1943); *Factor* v. *Laubenheimer,* 290 U.S. 276, 294-95 (1933).

The Warsaw Minutes

The draft article presented to the delegates at Warsaw in 1929 would have extended liability "from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination . . ." (Warsaw Minutes at 264). It became evident that the draft article would have to be split and that passengers would have to be treated differently from goods and baggage. Mr. Peçanha, the

[13] In a prior Second Circuit decision involving the Warsaw Convention the dissenting judge stated: "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it" (*Lisi* v. *Alitalia-Linee Aeree Italiane, S. p. A.,* 370 F.2d 508, 515 (2d Cir. 1966), *aff'd by an equally divided court,* 390 U.S. 455 (1968)).

Brazilian delegate, asked "Can one make the carrier liable for the life of the passenger before he has boarded the aircraft? How many accidents can occur within the boundaries of the aerodrome before the departure takes place?" (Warsaw Minutes at 71, App. 78).

Mr. Sabanin, a delegate of the U.S.S.R., asked:

> "If a passenger is injured in the aerodrome before entering the aircraft, for example, while he is in the restaurant of the aerodrome, it does not seem logical . . . to say that the carrier would be liable. I admit that the proposal of the Delegation from Brazil is more explicit and better drawn than ours" (Warsaw Minutes at 72, App. 79).

The Italian delegate, Mr. Ambrosini, stated:

> "In sum, it is necessary, in my opinion, to have expressly in mind the case of a passenger killed or wounded by a third party in an aerodrome, because this case is not provided for in the present text.
>
> "I will add that should the conference adopt the proposal of the Delegation from Brazil, things will become much easier, because, according to this proposal, the system of liability of the Convention applies only when the passenger is on board the aircraft" (Warsaw Minutes at 70-71, App. 77-78).

The Brazilian delegate summarized the positions:

> "I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft" (Warsaw Minutes at 82, App. 89).

The Brazilian proposal was accepted by the delegates and the article was sent back to the drafting committee

from which the present language emerged and was adopted (Warsaw Minutes at 82-83, 205-206, App. 89-90, 92-93).[14]

Subsequent Discussion of Article 17

Subsequent discussion at the Fifth International Congress on Air Navigation held at The Hague in 1930, only one year after the Convention was drafted, evidences beyond doubt that the drafters never intended the Convention to apply to passengers inside an air terminal. The debate concerned the precise meaning of the words "any of the operations of embarking or disembarking." The disagreement, however, centered only on whether Article 17 included only a passenger's actual climbing into or out of the aircraft or whether it also extended to accidents taking place out on the traffic apron. D. Goedhuis, later president of the Hague Convention, presented the two views:

> "Further, art. 17 mentions 'embarquement' and 'débarquement'. The question is how to explain these words? There are two views viz: *a*) in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; *b*) in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane."[15]

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[14] The adopted Article 18(2) holds a carrier liable for damage to baggage or goods from "the period during which the baggage or goods are found in the custody of the carrier, whether in an airport or on board an aircraft . . ." (App. 93). Article 17, however, was specifically drafted to reflect the more limited application of the treaty to passengers, with the words "operations of" apparently being added in response to the question raised by Mr. DeVos with regard to someone actually on the boarding ladder of the aircraft (App. 88).

[15] Goedhuis, *Observations Concerning Chapter 3 of the Convention of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne,* 1-6 Septembre 1930 (1931) at 1163-4.

Mr. Goedhuis also explained that the drafters inserted the phrase "any of the operations of" to insure that the Convention would cover a trip involving more than one stop.

> "[T]he minutes of the meetings of the C.I.T.E.J.A. bring out that one did not want to consider only embarking or disembarking at the aerodrome of departure and of destination, but also the operation during a stop *en cours de route*. For that reason 'during *any* operations' was used in article 17." (Goedhuis, *National Airlegislations and the Warsaw Convention*, p. 196 (1937)).

The broadest possible interpretation one can legitimately give to Article 17, therefore, is one which would extend the period of liability to include those accidents occurring out on the traffic apron after the passenger has left the terminal building. In any event, this Court is not asked to make a choice here between the "broad" or "narrow" interpretation of Article 17. Under *either* interpretation, the airport buildings are excluded from coverage under Warsaw, as was the expressed intention of the Convention's drafters.

The overwhelming authority evidencing the intent of the parties to have local law rather than the Warsaw Convention govern accidents occurring inside airport buildings includes a statement by Mr. Giannini, the Italian delegate to the Warsaw Convention, that the "grave and unjustifiable rule . . . to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated" (Giannini, *Saggi di Diritto Aeronautico*, p. 233 (1932)). Dr. Otto Riese, German delegate to the Warsaw Convention stated unequivocally that the Convention excludes those accidents having

taken place while the passenger "is in the airport terminal buildings."[16]

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[16] Riese and Lacour, Précis de Droit Aérien, p. 265 (1951). *See* Goedhuis, National Airlegislations and the Warsaw Convention, p. 193 (1937) ("when the passenger goes from the airport buildings to the aircraft on the tarmac [traffic apron]"); Van Houtte, La Responsabilité Civile dans les Transports Aériens, Intérieurs et Internationaux, p. 80 (1940) ("goes out on the runway to get to his plane or embark on it"); Lemoine, Traité de Droit Aérien, p. 540 (1947) ("from the time when the passenger goes out onto the departure apron"); Lureau, La Responsabilité du Transporteur Aérien, p. 90 (1961) ("from the time when the passenger leaves the terminal building of the airport"); Bonet Correa, La Responsabilidad en el Derecho Aereo, p. 68 (1963) ("the period of air carriage begins when the traveller steps onto the runway"); Milde, The Problems of Liabilities in International Carriage by Air, p. 57 (1963) ("when the passenger . . . leaves the airport building"); H. Drion, Limitation of Liabilities in International Air Law, p. 83 (1954) ("from the final gate to the aircraft and vice versa").

See also de Juglart, Traité Elémentaire du Droit Aérien, p. 330 (1952) ("the language of Article 17 by itself does not precisely define what is meant by 'operations of embarking or disembarking.'"); Heller, Notes on the Proposed Revision of Article 17 of the Warsaw Convention, 20 Int'l & Comp. L. Q. 142, 146 (1971) ("it would seem advisable to define clearly and unequivocally when and where embarkation begins and disembarkation ends." Mr. Heller suggests that the Guatemala Protocol draft be amended so that "[t]he rule of absolute liability would then apply only . . . on board an aircraft in flight."); and Shawcross and Beaumont on Air Law, pp. 441-442 (3rd ed. 1966) ("the exact meaning . . . is a question of some difficulty. Clearly the phrase includes the time during which the passenger is ascending or descending the steps of the aircraft. However, the words 'In the course of *any* of the operations' of embarking or disembarking appear to envision a wider period of liability and probably include the time during which the passenger's movements are under the control of the carrier for the purpose of embarking and disembarking."

But see Matte, Traité de Droit Aérien-Aéronautique, p. 405 (1964), where, citing the dicta in *Blumenfeld* and the 1961 trial court decision in *Maché* which was later reversed, Matte states his view that embarking commences "from the time when the passengers are taken in charge by the employees of the airline to be led to the plane."

Paul Chauveau, Honorary Dean and Professor of Law at the University of Bordeaux, has also addressed the question of when liability attaches under Article 17 and has specifically stated that the terminal building was excluded by the drafters of the Convention:

> "The period during which the passenger is in the buildings of the airport was eliminated . . ." (Note by P. Chauveau [1968], D. S. Jur. 517.)

Dean Chauveau has also noted that

> "In the case of conventions such as that of Warsaw whose purpose is to formulate uniform international rules, one cannot justify a free interpretation which judges of the so-called scientific school permit themselves in the application of internal law. A stricter interpretation, more or less exegetic, following the words of the text and the common intention of the high contracting parties, is called for." (Note by P. Chauveau, D. S. Jur. 82 (1970), J.C.P. II 16353) (Cass. Crim.)).

The recitation of this long line of authority is necessary due to the conclusion of the court below that the legislative history and subsequent development supported its conclusion (App. 11). The failure of courts to apply proper rules of interpretation, as did the court below, can only result in the frustration of the purposes of all treaties. In accordance with Article 41 of the Warsaw Convention, delegates met at The Hague in 1955 and in Guatemala in 1971 and officially made changes in the Treaty. In both instances, although other provisions of the Treaty were changed, the scope of the Treaty, as expressed in Article 17, was not. The court below, however, substituted its own notions of policy for the expressed intent of the over 100 signatory states.

III. This Case Involves Important Issues of Treaty Interpretation Requiring Resolution by this Court.

Since vast numbers of people travel on international flights each day, it is important that both the traveling public and the airlines be given uniform guidance as to the applicability of this Treaty. The decision below, conflicting with the drafters' intent and prior judicial precedent, has the effect of unilaterally amending the Treaty so that it would now apply to persons inside the airport buildings. The compelling need for this Court to exercise its certiorari jurisdiction in a case such as this is self-evident.

That the issues presented by this case are of widespread concern is demonstrated by substantial litigation involving the identical issues in at least twelve other pending cases.[17]

Furthermore, this issue will have continuing significance since the Guatemala Protocol, which will amend certain provisions of the Warsaw Convention, contains the identical language at issue here.

If extending the concept of absolute liability to a situation which the adhering States specifically excluded be "in harmony with modern theories of accident cost allocation," then it is for the adhering States, not the court below, to change the Treaty, which as recently as 1971 these States chose not to do.

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[17] There are six cases in the Southern District of New York, two in the New York State courts, two in the District of New Jersey, and two in the Western District of Pennsylvania. Additionally, a multi-districted action, *In Re Tel Aviv*, involves approximately 48 cases of which three are being brought under the absolute liability provisions of the Convention.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1976

Certificate of Service.

JOHN N. ROMANS, an attorney for petitioner and a member of the Bar of this Court certifies that on March 19, 1976, three copies of the foregoing Petition for a Writ of Certiorari and separate Appendix were served by mail upon all parties required to be served as follows:

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Dated: March 19, 1976

JOHN N. ROMANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1354

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

ARISTEDES A. DAY, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF TRANS WORLD AIRLINES, INC.

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SUPPLEMENTAL BRIEF OF TRANS WORLD AIRLINES, INC.

PRELIMINARY STATEMENT

Petitioner, Trans World Airlines, Inc. ("TWA"), respectfully submits this supplemental brief pursuant to Rule 24(5) to bring to the Court's attention the decision of the Third Circuit in *Evangelinos* v. *Trans World Airlines,* dated May 4, 1976, annexed as Appendix A.

THE DECISION OF THE THIRD CIRCUIT POINTS UP THE CONFLICTING POLICY CONSIDERATIONS CONCERNING THIS TREATY

The decision points up the conflicting policy considerations concerning this international treaty which is "by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties . . ." (Lowenfeld, Aviation Law § 4.1 (1972)). A modification of this treaty, which, however, maintains the same treaty language interpreted below, is expected to be sent to the Senate for their advice and consent later this year (TWA petition at 5–6).

The majority in *Evangelinos* recognized that uniformity of law was a primary purpose of the treaty and followed the decision of the Second Circuit in *Day*, which was based primarily on an American tort theory of accident cost allocation.

Chief Judge Seitz, in a vigorous dissent, also recognized that uniformity of law was a primary purpose of the treaty, but that this uniformity was intended to be international and not simply between circuits of the United States. His examination and analysis led him to agree with the first Circuit's decision, *MacDonald* v. *Air Canada* (discussed in TWA's Petition at 9) and with the decision of the Supreme Court of France in *Maché* v. *Air France* (discussed in TWA's petition at 9-10). Chief Judge Seitz also responded to the theory of accident cost allocation with respect to an international compact:

> "While I do not question the soundness of these principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17," (Appendix A at 19).

Chief Judge Seitz correctly pointed out that it is not for a court in the United States to rewrite a treaty which would have impact beyond the borders of the United States:

> "As the majority correctly notes, there is a substantial interest in uniformity of decision in this area. *Block* v. *Compagnie National Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). I do not believe, however, that the interest in uniform *international* interpretation of the treaty, adverted to in *Block*, compels us to follow the Second Circuit's decision in *Day* v. *Trans World Airlines*, *supra*, since that decision is inconsistent with prior decisions of United States courts and, more importantly, with a decision of the highest court in France. If deference is due in order to achieve international uniformity, I believe we should respect the French interpretation of a treaty which was written and negotiated in the French language," (emphasis in original; Appendix A at 13 n.2).

TWA would also inform the Court that the appeal from Judge Gignoux's decision, *In Re Tel Aviv* (discussed in TWA's petition at 11-12), has now been perfected and is to be submitted to the First Circuit during the June term.

It is apparent that the law in the Second and Third Circuits is now substantially in conflict with that in the First Circuit and directly in conflict with that of France as determined by that country's highest court. It is indeed ironic that the substantive law on this important question should be different in the United States and France, two signatory nations to this treaty, when the very purpose of the treaty is to achieve international uniformity of law. This is clearly an instance where the highest court of the United States should exercise its certiorari jurisdiction.

CONCLUSION

For the foregoing reasons TWA's petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 14, 1976

Appendix A, Opinion, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1990

CONSTANTINE EVANGELINOS, CALLIOPPI EVANGELINOS, ERMA EVANGELINOS, STELLA EVANGELINOS and MARY JULIA EVANGELINOS,
Appellants

v.

TRANS WORLD AIRLINES, INCORPORATED

(D.C. Civil No. 74-165)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1976

Before SEITZ, *Chief Judge*, and VAN DUSEN and WEIS, *Circuit Judges*

Donald L. Very, Esq., Tucker, Arensberg & Ferguson, Pittsburgh, Pa.,
Attorneys for Appellants

Michael L. Magulick, Esq. & Robert E. Wayman, Esq., Wayman, Irvin, Trushel & McAuley, Pittsburgh, Pa.,
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Appendix A.

OPINION OF THE COURT

(Filed May 4, 1976)

VAN DUSEN, *Circuit Judge.*

On August 5, 1973, the Transit Lounge of the Hellinkon Airport in Athens, Greece, was the scene of a vicious terrorist attack on the passengers of TWA's New York bound Flight 881. The principal question presented by this interlocutory appeal [1] concerns the liability of Trans World Airlines under the terms of the Warsaw Convention, 49 Stat. 3000, *et seq.* (1934), as modified by the Montreal Agreement of 1966, 31 Fed. Reg. 7302 (1966).[2] The district court concluded that the terms of the Convention were not applicable to the plaintiffs at the time of the terrorist attack and accordingly granted TWA's motion for partial summary judgment, dismissing the claim under the Warsaw Convention.[3] *Evangelinos v. Trans World Airlines,* 396 F. Supp. 93 (W.D. Pa. 1975). We reverse and remand.

The facts of the attack on which this litigation is based have been exhaustively summarized elsewhere [4] and need not be repeated here. It is enough to state briefly that, at the time of the terrorist attack, plaintiffs had already completed all the steps necessary to boarding the aircraft except (1) undergoing physical and handbag

1. By amended order dated June 26, 1975, the district court certified this appeal pursuant to 28 U.S.C. §1292(b) (232-33a). On July 21, 1975, we granted plaintiff-appellants' petition for permission to appeal. Jurisdiction is based on 28 U.S.C. §§1331 and 1332. Plaintiffs are citizens of Ohio. Defendant is incorporated in the State of Delaware and has its principal place of business in New York.

2. Both the Convention, a treaty officially entitled "A Convention for the Unification of Certain Rules Relating To International Transportation by Air," and the Montreal Agreement are reprinted at 49 U.S.C. §1502 note (1970).

3. The complaint alleged both absolute liability under the Warsaw Convention, as modified, and negligence.

4. *Evangelinos v. Trans World Airlines, Inc., supra* at 96-98, and *Day v. Trans World Airlines,* 528 F.2d 31 (2d Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3546 (U.S., Mar. 30, 1976).

Appendix A.

searches,[5] and (2) physically proceeding from the search area to the aircraft some 250 meters away. Immediately after Flight 881 was announced over the Transit Lounge loudspeaker, the passengers were instructed to form two lines in front of Departure Gate 4. And, while all but a handful were standing in those lines awaiting the search procedure,[6] two Palestinian terrorists fired bursts of automatic weapons fire in the general direction of the TWA queues and hurled hand grenades, which exploded in the vicinity.

Under the terms of the Warsaw Convention, as modified, TWA is absolutely liable to a limit of $75,000. per passenger if an incident which causes passenger injury

5. These searches were required and conducted by the Greek Government and were prerequisites of being permitted to leave the airport by plane. TWA had two guards stationed inside the terminal building immediately beyond the search procedure area.

6. The district court stated that:

". . . entrance to [the Transit Lounge] is restricted to passengers ticketed and scheduled to depart on international flights of the . . . carriers operating out of the terminal and to other personnel, who are not passengers, needed to service the area. . . . At . . . Gate [4], there are two separate lines, one for males and one for females, where there is a handbag search and a physical search made by the Greek Police. There are tables for examination of hand luggage and behind the tables were located two booths for physical search of all persons intending to depart. After the search, passengers would proceed through double doors out of the Transit Lounge where they boarded buses for transportation to the aircraft stationed at some distance from Gate 4.

". . . Two TWA Security Guards were stationed at Gate 4 as well as at least two passenger service personnel of TWA. After being physically searched, the passengers would have walked to two sets of exit doors which led from the Transit Lounge to a raised terrace attached to the terminal building. Two sets of stairs were located on the east side of the terrace leading to a waiting area where there was a bus . . . intended to carry persons across the traffic apron a distance of approximately 250 meters to where the airplanes were parked for loading.

"At the time of the attack, all eighty-nine passengers scheduled to board TWA Flight 881 had checked in and received their boarding passes. The Plaintiffs had completed the various steps required and began to queue up in two lines preparatory to proceeding through the hand baggage and physical searches. . . .

"Approximately seven Flight 881 passengers had departed through Gate 4, exited the Transit Lounge, and had either boarded or were about to board the bus previously referred to. The great majority of the eighty-nine scheduled passengers for Flight 881 were in line in front of the tables at Gate 4 at the time of the incident. The Plaintiffs were injured while being queued up in line in front of Gate 4 while waiting to be searched."

Pages 97-98 of 396 F. Supp. (footnotes omitted).

falls within the ambit of Article 17 of the Convention.[7] Article 17 provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft *or in the course of any of the operations of embarking or disembarking.*" (Emphasis added.)

TWA does not dispute the district court's conclusion that a terrorist attack on airline passengers is an "accident" within the meaning of Article 17. Thus the central question is whether the terrorist attack took place "in the course of any of the operations of embarking . . . ."

Our task has been significantly facilitated by the Second Circuit's recent decision in *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3546 (U.S., Mar. 30, 1976), an identical case arising out of the same incident. See also *Leppo v. Trans World Airlines, Inc.*, — Misc. 2d — (N.Y. Sup. Ct. No. 21770-1973, Trial Term Part 62, Decision of Mar. 10, 1976, N.Y. County). In the *Day* case, Chief Judge Kaufman, in a thorough and scholarly opinion, carefully analyzed the history and purposes of the Warsaw Convention, as modified. Emphasizing the American experience under

7. As originally conceived and drafted, the Convention effected a bargain in which airline passengers traded a monetary limitation on damages—the equivalent of $8,300. per passenger—for the establishment of a rebuttable presumption of liability on the part of the carrier for "accidents" falling within the ambit of the Convention. Warsaw Convention, Chap. III. American dissatisfaction with this bargain, especially the limits on damages, ultimately led to the Montreal Agreement, a voluntary agreement between air carriers governing international transportation that involved a United States location. Pursuant to the Agreement, each participating airline filed with the Civil Aeronautics Board a contract under which the damages limit was raised to $75,000. and the various carriers agreed not to assert any of the affirmative defenses provided in Article 20 of the Convention. The effect was contractual creation of a new regime of absolute liability for damages arising from incidents falling within the Convention. For excellent discussions of the background of the Warsaw Convention and the Montreal Agreement, see *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

the Convention, the current expectation of air carriers governed by the Convention as modified, and the considerations militating in favor of liability in this case, the *Day* court unanimously concluded that the activities of the TWA passengers in this case fell within the purview of the phrase "the operations of embarking." We agree with the result reached in *Day* and note that there is a substantial interest in uniformity of decision in this area. *Cf. Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

Giving the phrase "in the course of any of the operations of embarking" a common sense construction, we agree at the outset with plaintiffs' contention that we must examine the nature of the activity in which plaintiffs were engaged to determine if that activity can fairly be considered part of "the operations of embarking." Nothing in the Convention defines the term "operations of embarking" or otherwise delimits the period of liability prior to actual boarding. Nevertheless, for substantially the same reasons expressed in *Day v. Trans World Airlines*, *supra*, 528 F.2d at 33-34, we believe it is appropriate under all the facts and circumstances of this case to view the activity of undergoing pre-boarding searches as part of the "operations of embarking."[8]

The undisputed facts reveal that, at the time of the attack, the plaintiffs had completed virtually all the activities required as a prerequisite to boarding and were standing in line at the departure gate ready to proceed to the aircraft. The plaintiffs' injuries were sustained while they were acting at the explicit direction of TWA and while they were performing the final act required as a prerequisite to boarding busses employed by TWA to take the Evangelinos family to the aircraft. More significantly, at the time these operations had commenced, Flight 881

8. Among the relevant factors are activity, control and location. We emphasize the activity in which plaintiffs were involved, the control by defendant of the plaintiffs at the time of the accident, and the relation of the terrorist attack causing the accident to air travel.

had already been called for final boarding. As a result, TWA passengers were no longer mingling over a broad area with passengers of other airlines. Instead, acting pursuant to instructions, they were congregated in a specific geographical area designated by TWA and were identifiable as a group associated with TWA's Flight 881.

By announcing the flight, forming the group and directing the passengers as a group to stand near the departure gate, TWA had assumed control over the group. This conclusion is supported by the fact that TWA service personnel were standing at Gate 4, guiding the passengers, and TWA security personnel were present. Under these circumstances, it is reasonable to conclude that TWA had begun to perform its obligation as air carrier under the contract of carriage and that TWA, by announcing the flight and taking control of the passengers as a group, had assumed responsibility for the plaintiffs' protection. Thus, for all practical purposes, "the operations of embarking" had begun.

Neither *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971), nor the French case of *Maché v. Air France*, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd* Rev. Fr. Droit Arien 311 (Cour de Cassation 1970) (reprinted in translation as Exhibit B to appellee's brief), is inconsistent with the conclusion that "the operations of embarking" had commenced at the time of the accident in this case. First, both cases involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which plaintiff was engaged differed significantly from the case at bar.[9] Fur-

9. See also *In Re Tel Aviv* (D. P.R. Dec. 9, 1975) (Nos. 518-72 et al.). In *MacDonald*, the plaintiff was injured while she was waiting for her baggage in the baggage claim area of Boston International Airport. She was in no sense under the control of the airline or acting as a part of a group under direct airline supervision. In *Maché*, the plaintiff was injured while walking from the aircraft. He was following an Air France stewardess and it is not completely clear whether his route varied from hers, since the manhole cover did not "rock" causing her to fall. Also we note that the plaintiff in *Maché* was arguing against the applicability of the Warsaw Convention and that the court in *MacDonald* held that the plaintiff's injuries in that case were not caused by an "accident" within the meaning of Article 17.

ther, both the *MacDonald* and *Maché* courts considered the Convention's original goal of developing rules to govern the risks then thought to be inherent in air carriage and concluded, on that basis, that the Convention did not apply because the plaintiffs had reached "safe" points, distant from such risks. *MacDonald v. Air Canada, supra* at 1405; *Maché v. Air France, supra.* See also, Sullivan, The Codification of Air Carrier Liability by International Convention, 7 Journal of Air Law 1, 20 (1936). Since the danger of violence—whether in the form of terrorism, hijacking or sabotage—is today so closely associated with air transportation, we have little difficulty in concluding that the plaintiffs in this case were not located in a "safe place," far removed from risks now inherent in air transportation. We note that another terrorist attack on airline passengers recently occurred in Israel. See *In re Tel Aviv, supra* at note 9. To conclude otherwise would be to freeze the Warsaw Convention in its 1929 mold, when air travel was in its infancy, and to ignore current air travel procedures and the special risks created by the type of violence that resulted in this tragedy.

Nor are we convinced by TWA's principal argument that "the operations of embarking" can never occur within the physical confines of an air terminal building and that the Warsaw Convention is, therefore, inapplicable. Starting, as we must, with the actual language used in Article 17, we are struck by the fact that nothing in Article 17 suggests a limitation on the period of liability based strictly on the location of the "operations of embarking or disembarking." To the contrary, the contrast between the phrase "while on board the aircraft" and the phrase "in the course of any of the operations of embarking . . ." indicates that the draftsmen of Article 17 made a conscious choice to go beyond a mere location test. Further, adoption of the strict location test advanced by TWA could lead to differing results resting solely on the fortuity of where passengers are placed at the time of injury. In the

absence of plain language compelling such a conclusion, we reject it.

Recognizing that nothing on the face of Article 17 supports their argument, TWA directs our attention to the treaty making history of that Article. The pertinent history consists of debates centered around Article 20 of the draft Convention prepared by a small committee of experts, Comité Internationale Technique d'Experts Juridique Aeriens (CITEJA), for consideration at Warsaw. Article 20 of the CITEJA draft provided in part:

> "The period of carriage, for the application of the provisions of the present chapter [Liability of the Carrier] shall extend from the moment when the travellers . . . enter the aerodrome of departure, up to the moment when they leave the aerodrome of destination . . . ."

When the draft Article 20 came up for consideration, it provoked considerable debate between those who endorsed the expansive aerodrome-to-aerodrome period of liability and those who espoused a more restrictive view. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, 67-84 (R. Horner & D. Legrez transl. 1975) (hereinafter Minutes). Ultimately the principle of aerodrome-to-aerodrome liability was put to a vote and defeated. Minutes at 82-83. The problem of drafting a new article in conformity with the vote was then referred to a drafting committee and Article 17 in its present form emerged.

TWA contends that the rejection of the CITEJA draft demonstrates that the delegates intended to exclude from the period of liability the time during which passengers are inside air terminal buildings. We disagree. While the rejection of the CITEJA draft indisputably reflected an intent to restrict the expansive period of liability envisioned by Article 20, nothing in the debates indicates that the line was finally and unalterably drawn at the walls of

airline terminal buildings.[10] Surely if such an explicit line had been drawn, the language of Article 17 would now reflect it. Moreover, the debates indicate confusion among the delegates themselves as to the meaning of the rejection of the CITEJA draft. Minutes at 83-84.[11] We are, therefore, especially reluctant to draw conclusions which are not reflected in the work of a drafting committee that had the advantage of considering the debates contemporaneously.

The most that can be said is that the draftsmen rejected the concept of automatic liability (subject, of course, to the defenses provided elsewhere in the Convention) for all accidents within the limits of the aerodrome. Our conclusion that under certain circumstances there may be liability for some accidents within a terminal building is not inconsistent with that intent. Furthermore, by analyzing this case, as we have, in light of the carrier's control over the passengers and the likelihood of injury by causes inherent in air transportation, we have accommodated the concerns of those who opposed the CITEJA draft without doing violence to the language of Article 17.[12]

---

10. In 1929, the word "aerodrome" meant the entire airfield property on which there were several buildings used by passengers, as opposed to the single, large, air terminal building characteristic of major airports in this country today.

11. We do not find the debates as clear as the dissent indicates. Although the delegates agreed that "rejection of [Draft Article 20] led to acceptance of the opposite principle," it is unclear as to what that "opposite principle" was. In *Day, supra*, the Second Circuit concluded that the Convention had adopted the views of Prof. Georges Ripert of France—the "dean of French writers on civil law"—who "proposed that the article be recast in terms broad enough to allow the courts to take into account the facts of each case." 528 F.2d at 34-35. In any event, it is clear from the final language of Article 17 that the strict Brazilian proposal, as articulated by the delegate from Great Britain, which would have limited the period of liability to the time when passengers were "on board the aircraft," was not adopted.

12. The debates indicate that the principal fear was that carriers would be liable for injuries sustained by passengers at times when the airline had no control over what the passengers were doing. As Prof. Georges Ripert of France stated:

> "There is real difficulty only for travellers, and this difficulty arises from the fact that the traveller has his independence . . . ."
>
> Minutes at 73.

Virtually all delegates agreed that there should be liability while the passengers were onboard the aircraft—a period when the carrier had complete control over both the passengers and their environment.

Cf. Shawcross & Beaumont, Air Law, at 441-42 (3d ed. 1966); Matte, Traité de Droit Aerien Aeronautique, at 404-05 (1964); Sullivan, *supra*.

Accordingly, the June 26, 1975, judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

SEITZ, *Chief Judge*, dissenting.

The majority holds that the defendant airline is strictly liable under Article 17 of the Warsaw Convention for the injuries which plaintiffs sustained within an airport terminal while waiting to board their flight, since those injuries occurred "in the course of . . . the operations of embarking." I believe the majority's interpretation of Article 17 is unsupported by the relevant history of the treaty and with the exception of the Second Circuit's recent decision in *Day v. Trans World Airlines*, 528 F.2d 31 (2d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3546 (U.S. March 30, 1976), is contrary to the decisions of courts in several signatory countries.

In an attempt to define the scope of the rather imprecise language of Article 17, the majority rejects the "location test" advanced by TWA and adopts instead an "activity test" under which a passenger's activities are regarded as largely determinative of whether that passenger was engaged in the operations of embarking. The majority reasons that the "location test" could lead to inconsistent results based solely on the fortuity of where the injured passenger was stationed at the time of injury. I believe that both location and activity must be examined in order to determine whether a passenger's injuries were sustained during embarkation.

The starting point of my analysis is the policy underlying the enactment of the Warsaw Convention. As originally adopted, the Convention was designed to shield the

infant airline industry from potentially crippling damage awards for injuries caused by risks inherent in air transportation. In order to accomplish this objective, the treaty restricted an airline's potential liability to approximately $8,300, in exchange for a presumption that the airline was liable if the accident took place on board the aircraft or during embarkation.

Plaintiffs maintain that the signing of the Montreal Agreement in 1966 marked the rejection of the Convention's original goal and that the Convention, as modified by the Montreal Agreement, is now intended to afford protection solely to the passenger. While it is true that the Montreal Agreement increased the damage limitation to $75,000 and established a system of liability without fault,[1] the Agreement retained in toto the other provisions of the Convention, including Article 17. Thus, while the potential recovery of those previously covered by the Convention was significantly increased, the class of passengers entitled to the treaty's protection and the types of accidents on which liability could be based remained the same. I therefore believe that the Convention's original policy of limiting an airline's liability for personal injuries caused by the unique perils of air navigation retains its vitality, notwithstanding the adoption of the Montreal Agreement. While I am not unmindful of the strong interest in providing injured passengers with an adequate recovery, where their injuries are otherwise within the coverage of the Convention, I believe this goal has been accomplished

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1. It is significant to note that the United States was initially opposed to the principle of absolute liability since it viewed the fault requirement as a necessary protection for the growth of the airline industry. The subsequent retreat from this position occurred when the $100,000 liability limit which the United States advocated was rejected by the other signatories to the treaty. Following the defeat of this proposal, the effective denunciation of the treaty by the United States appeared imminent. The inclusion of a system of liability without fault which was designed to reduce litigation and to provide quicker settlements was therefore suggested as a compromise measure in order to ensure United States acceptance of the lower liability limits. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

through the increase of damage limitations and the elimination of the airline's "due care" defense.

The historical concern of the Convention drafters and delegates was with the unusual and grave risks which were then inherent in air travel. With this principle in mind, it is apparent that a passenger's location has a significant impact on the risks to which he is exposed. The farther a passenger is removed from the immediate vicinity of the airplane itself, the less likely it is that he will be injured by any of the unique perils which accompany air travel.

Certain dangers, such as the danger of skyjacking, are encountered once the passenger has boarded the aircraft. Obviously, the threat of skyjacking is not a substantial risk borne by passengers within the terminal. Hence, while skyjacking has been loosely labeled as a risk associated with air travel, *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973), it is evident that such activity creates a risk only to those so situated as to be exposed to the danger.

Like skyjacking, sabotage or terrorist activity may pose a threat to passengers boarding or on board an aircraft. To this extent, I agree that terrorism is a risk which accompanies international air travel. I am unable to agree, however, that this particular hazard is an incidental risk of air travel when it occurs within the confines of an airport terminal. Rather, in my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank or other public place. Accordingly, I believe the majority's conclusion that plaintiffs were injured as a result of a risk inherent in modern air travel is unwarranted. The particular hazards of terrorism which are unique to air navigation are simply not risks to which passengers in plaintiffs' proximity were exposed.

The importance of a passenger's location as it relates to the risks of air travel is underscored by the case law of this country as well as that of other signatories to the

treaty.[2] In the French case of *Maché v. Air France*, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd* Rev. Fr. Droit Arien 311 (Cour de Cassation 1970), the highest court in France determined that the Warsaw Convention only governs accidents arising on the ground at locations of the airport where passengers are exposed to aviation risks. In that case a disembarking passenger was led by 2 flight attendants across the traffic apron toward the terminal building. Due to construction work, a detour was taken through a customs area which was not on the traffic apron. The passenger accidentally stepped in a man-hole and was injured. In finding that the Warsaw Convention was inapplicable and did not restrict the passenger's potential recovery, the court ruled that the customs area in which plaintiff was injured was not an area exposed to risks of air navigation. Significantly, the court found that the only ground area where such risks were incurred was the traffic apron.

A case decided by the United States Court of Appeals for the First Circuit, *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971), also stresses the importance of a passenger's location in relation to the hazards of air travel. That case involved a 74 year old woman who mysteriously fell while awaiting her suitcase in the baggage area of an airport. The court affirmed a directed verdict in the defendant airline's favor on the ground that there was no basis for finding an "accident", the first requirement for invocation of the Convention. In any event, however, the court found that the injuries sustained by plaintiff did not occur during the operation of disem-

2. As the majority correctly notes, there is a substantial interest in uniformity of decision in this area. *Block v. Compagnie National Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). I do not believe, however, that the interest in uniform *international* interpretation of the treaty, adverted to in *Block*, compels us to follow the Second Circuit's decision in *Day v. Trans World Airlines, supra*, since that decision is inconsistent with prior decisions of United States courts and, more importantly, with a decision of the highest court in France. If deference is due in order to achieve international uniformity, I believe we should respect the French interpretation of a treaty which was written and negotiated in the French language.

barking since that operation had "terminated by the time the passenger [had] descended from the plane by the use of whatever mechanical means [were] supplied and [had] reached a safe point inside of the terminal . . . ." 439 F.2d at 1405. The court reasoned that the Warsaw Convention was not intended to apply "to accidents which are far removed from the operation of aircraft." *Id.* at 1405.

A determination as to whether a passenger's injuries were sustained in an area exposed to the particular risks of air navigation is thus a necessary first step in deciding whether that passenger was injured during the course of the operations of embarking. Since I believe this threshold determination must be resolved against plaintiffs in this case, I would affirm the judgment of the district court. However, even assuming plaintiffs were injured at a location where the perils of air travel are logically encountered, I do not believe they were injured while in the course of the operations of embarking as required by Article 17. Rather, my reading of the Convention Minutes and the subsequent commentary on the treaty indicates that the delegates viewed the operations of embarking restrictively to include only the actual boarding of the airplane or, at best, the trip across the traffic apron from the terminal building to the plane. Under no circumstances were accidents inside the airport terminal regarded as within the scope of the treaty.

As the majority correctly observes, the present language of Article 17 resulted from the delegates' rejection of Article 20 of the CITEJA draft which would have imposed liability from the time of entry of the "aerodrome of departure" until the time of exit from the "aerodrome of arrival." During the debates on Article 20, several amendments were proposed to distinguish between the liability for carriage of passengers and that for transportation of goods. A representative example is the proposal by the delegate from Brazil which suggested that the language of Article 20 be amended:

> "to replace 'from the moment when travelers, goods and baggage enter the aerodrome of departure up to the moment when they leave the aerodrome of destination' by 'from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder'."

Minutes at 71.

The French Delegation would have amended Article 20 to limit the airlines' liability for injuries to travelers to those injuries sustained during the course of carriage. During the discussions which followed the various proposals, it became evident that there was considerable dissatisfaction among the delegates with the expansive provision for passenger liability embodied in Article 20 and a widespread feeling that the Article should be re-submitted to the Drafting Committee for revision.

Believing that important questions of substance rather than mere matters of re-wording were raised by the several proposed amendments, the delegate from Great Britain suggested that the Convention pass on the substantive issues before referring Article 20 to the Drafting Committee. He remarked as follows:

> "It seems to me that here there are questions of principle upon which one can pass before the referral to the drafting committee.
>
> "For example, as regards travelers, does liability begin, as it is said in the draft, upon the entrance into the aerodrome of departure, or does it begin when the traveler is on board the aircraft? Here is the divergence as it exists as regards the travelers: When must liability begin? Following the principle established in the draft of the Convention, or simply when the traveler is on board?
>
> "It's a question upon which I ask that one pass before the referral to the drafting committee."

Minutes at 80-81.

These sentiments were echoed by the Reporter for the preliminary draft who stated:

> "We should make a decision first of all on the carriage of travelers and then on the carriage of goods. The situation, in effect, can be different.
>
> "In the carriage of travelers, there is a double solution possible: either maintaining the text which would consist in engaging the liability of the carrier as soon as the passenger enters the aerodrome, or accepting the suggestion which was made which consists in saying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft.
>
> "I point out again that this last solution, practically, is not one at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped [sic] on the step-up of the aircraft, the step-up which is not an actual part of the aircraft, and be injured by another aircraft.
>
> "Be that as it may, the proposal is very clear."

Minutes at 81.

The substantive question was then called to a vote.

So that there could be no doubt as to the precise question on which the delegates were voting, the delegate from Luxembourg emphasized that

> "before deciding to refer to the drafting committee, it is indispensable to vote in the sense of the proposals made by the British delegation, which discriminated very well between the various cases. When the conference will have made a decision on these points which will be submitted to a vote, then the drafting committee will be able to work in a useful manner."

Minutes at 82.

The Brazilian Delegation likewise reiterated:

> ". . . I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft."

Minutes at 82.

Thereafter, a vote was taken and the proposed draft of Article 20 was defeated. Following revision, the current Article 17 emerged from the Drafting Committee and was adopted.

The majority concludes that the debates indicate confusion among the delegates as to the meaning of the rejection of the CITEJA draft. I am unable to subscribe to this position in view of the overwhelming evidence to the contrary. The objections which were voiced to the CITEJA draft of Article 20 and the several amendments which were proposed during the debates all reflect a common desire on the part of those opposed to the draft Article to restrict a carrier's liability for personal injuries to injuries which occurred on board or while the passenger was embarking. Agreement with respect to this limitation among the delegates who were critical of the CITEJA draft was almost universal. Naturally, certain questions were raised as to whether this alternative proposal would cover injuries sustained "in the case of the aircraft which is still in the hangar, which is on the traffic apron, which is taxiing, etc. . . ." Minutes at 77. Questions were also posed as to whether the proposal would cover a passenger injured on the stairway which leads to the interior of the aircraft. Minutes at 78, 81. None of the factual variations or hypothetical possibilities which were raised, however, even remotely suggested that the restrictive proposal might be construed to cover passengers within the terminal. To the contrary, it was in reaction to the imposition of lia-

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bility under such circumstances that the proposal was conceived.

I therefore believe that in rejecting the CITEJA draft of Article 20, the delegates intended to signify their approval of a proposal which would limit an airline's liability for personal injuries to those injuries which occurred during flight or while the passenger was boarding. Their subsequent adoption of Article 17 must be viewed as an affirmance of this more restrictive concept of liability. It appears likely that the phrase "during the course of any of the operations of embarking" was inserted in order to make explicit that the Article covered the passenger who was on the stairway preparing to enter the airplane in addition to passengers who had already boarded.

If any confusion existed as to the scope of the terms "embarking" and "disembarking", it was limited to the question of whether the Convention embraced accidents which occurred while the passenger was physically proceeding from the terminal to the plane or whether it covered only mishaps during the actual physical process of boarding. At the Fifth International Congress on Air Navigation—held only 1 year after the Warsaw Convention was drafted—a leading expert on air travel, Mr. D. Goedhuis, presented a paper in which he summarized the prevailing interpretations of Article 17 as follows:

> "Further, art. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views *viz:* a) in a broad sense: *i.e.* the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, *i.e.:* the getting on board and the alightment only comprise the actual getting in and out of the aeroplane." D. Goedhuis, *Observations Concerning Chapter 3 of the Convention*

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> *of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne,* 1-6 Septembre 1931 (The Hague 1931) at 1163-64.

While Mr. Goedhuis advocated amending Article 17 to reflect the broad interpretation of "embarking", he was opposed by others, including at least one delegate to the Warsaw conference itself, who argued that the narrow interpretation which confined liability to accidents occurring during the actual process of boarding, was the proper one. It is significant to note, however, that under either interpretation, the injuries suffered by plaintiffs in the instant case would be outside the scope of Article 17. I therefore conclude that plaintiffs were not injured in the course of "embarking" as that term was restrictively intended.

My conclusion is not altered by the modern theories of accident cost allocation on which the Second Circuit relies in part in *Day v. Trans World Airlines, supra.* The Second Circuit finds that a broad construction of Article 17 is appropriate since the airline is in the best position to distribute accident costs among all passengers and to assume preventative measures. While I do not question the soundness of these principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17. Had the signatories to the Convention wished to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense was eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement.

Having concluded that plaintiffs were injured at a location which was neither exposed to the hazards of air

travel nor within the delegates' intended scope of coverage, I would ordinarily end my analysis. However, in view of the majority's emphasis on the activity in which plaintiffs were engaged at the time of injury, I feel compelled to state briefly my views as to the relevance of this factor and to address the majority's argument.

An examination of an individual's activity is only necessary, I believe, once it has been determined that the individual was situated in the immediate vicinity of an airplane where the risks of air travel are logically encountered. Obviously, the physical activity of walking toward a plane on the traffic apron or ascending the stairway to the plane's interior is no different than the activity in which a passenger engages at numerous locations within an airport. The distinguishing feature, therefore, must be the location at which this activity is performed.

Location, while important in identifying the potential class of passengers entitled to recover, is nevertheless not conclusive as to whether an individual passenger was injured while engaged in the operation of embarking. Rather, the injured victim's conduct must also be scrutinized in order to determine whether, objectively viewed, his activities were within the scope of Article 17. Clearly, an individual who is injured at a dangerous location while on a lark of his own cannot be said to be "embarking" and should not be permitted to recover under the Convention. Only those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery.

Although conceding that plaintiffs had not completed the preliminary steps necessary to boarding their flight in that they had not been searched and had not departed from the search area to board the bus which would take them to their awaiting flight, the majority nevertheless concludes that by standing in line waiting to be searched plaintiffs were engaged in the activity of embarking. It bases

this conclusion on a finding that TWA had assumed control over the passengers and on its belief that terrorist attacks within an airport are inherent risks of modern air travel.

As previously noted, I do not adhere to the majority's view that terrorism within an airport is a unique peril of air navigation. Moreover, I question the relevance of this factor if, as the majority suggests, an analysis of the activity in which a passenger is engaged at the time of injury is to be largely controlling.

With respect to its assertion that TWA had assumed control over its passengers, the majority proves too much. It cannot be gainsaid that passengers who are actually boarding and even those who are proceeding from the terminal to the plane on the traffic apron are subject to the airline's authority. Control is therefore inherent under the more restrictive interpretation of Article 17 which I have proposed.

It is equally clear, however, that passengers at many locations within the terminal are also, to a large extent, under the control of the airline. The majority's control analysis is therefore, at best, imprecise. In apparent recognition of the over-inclusiveness of its control classification, the majority seeks to impose yet another restriction on the class of persons who are entitled to recover under Article 17, namely, membership in an identifiable group associated with a particular flight and located within a specific geographical area designated by the airline. In effect, however, this additional restriction elevates location—a factor which the majority only nominally accepts—to a position of critical importance. Control becomes a mere artifice to permit recovery within the terminal, yet under limited circumstances.

I therefore conclude that the factors relied upon by the majority in support of its conclusion that plaintiffs were engaged in the activity of embarking are largely irrelevant. Since I believe that plaintiffs' location within the airport

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terminal precludes their recovery under Article 17, I would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

CERTIFICATE OF SERVICE

JOHN N. ROMANS, an attorney for petitioner and a member of the Bar of this Court certifies that on May 14, 1976, copies of the foregoing Supplemental Brief were served by hand upon all parties required to be served as follows:

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Dated: May 14, 1976

JOHN N. ROMANS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1354

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

ARISTEDES A. DAY, et al.,

Respondents.

SUPPLEMENTAL BRIEF OF TRANS WORLD AIRLINES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents.

SUPPLEMENTAL BRIEF OF TRANS WORLD AIRLINES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner, Trans World Airlines, Inc. ("TWA"), respectfully submits this supplemental brief pursuant to Rule 24(5) and in reply to the brief of the Solicitor General.

Pending Cases in Other Circuits

Two cases central to the issue before this Court are currently awaiting decision in two circuit courts of appeals. The Third Circuit will rehear in banc in November, 1976 a case decided on identical facts, *Evangelinos* v. *Trans World Airlines, Inc.*, No. 75-1990.

An appeal from *In Re Tel Aviv*, 405 F. Supp. 154, 157 (D.P.R. 1975) ("[T]he delegates to the Convention specifically intended to exclude from coverage accidents occurring to passengers inside an airport terminal building.")

was submitted to the First Circuit *sub nom. Hernandez* v. *Air France,* No. 76-1146, on June 8, and is currently under consideration.

The Decision Below Conflicts With the Decision of the Supreme Court of France

On page 14 of the Solicitor General's brief it is stated:

> "[T]he French court's opinion [in *Maché*] takes a more restrictive view of the scope of Article 17 than that taken by the court of appeals below. . . ."

Moreover, in footnote 6 it is suggested that the French court's interpretation of this treaty, debated and drafted in French, resulted in a "misconstruction." It is apparent, therefore, that there is a conflict between the decision below and that of the Supreme Court of France.

Conclusion

For the foregoing reasons TWA's petition for a writ of certiorari should be granted or, in the alternative, this Court might await the decisions of the Third Circuit in *Evangelinos* and the First Circuit in *Hernandez* before making a determination.

Respectfully submitted,

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Certificate of Service

JOHN N. ROMANS, an attorney for petitioner and a member of the Bar of this Court certifies that on October 6, 1976, three copies of the foregoing Supplemental Brief of Trans World Airlines, Inc. in Support of Petition for Writ of Certiorari were served by mail upon all parties required to be served as follows:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1354

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

ARISTEDES A. DAY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000, *et seq.*; T. S. 876.

Official French, 49 Stat. at 3005

Article 17.

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

Article 18.

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

(2) Le transport aérien, au sens de l'alinéa précédent, comprend la période pendant laquelle les bagages ou marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aérodrome.

(3) La période du transport aérien ne couvre aucun transport terrestre, maritime ou fluvial effectué en dehors d'un aérodrome. Toutefois lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve contraire, résulter d'un événement survenu pendant le transport aérien.

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929, 49 Stat. 3000, et seq.; T. S. 876.

U. S. Translation, 49 Stat. at 3018-3019

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed, outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

APPENDIX B

OPINION OF U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 279—September Term, 1975.

(Argued December 3, 1975 Decided December 22, 1975.)

Docket No. 75-7341

ARISTEDES A. DAY, THEODORA DAY and CONSTANTINE DAY, individually and ARISTEDES A. DAY and THEODORA DAY parents of CONSTANTINE DAY,

Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

KATE KERSEN, individually and as Administratrix Ad Prosequendum of the Estate of Elbert Kersen, deceased,

Plaintiff-Appellee,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

JOHN SPIRIDAKIS, BESSIE SPIRIDAKIS, LEONARD LAZARUS, SHIRLEY LAZARUS,

Plaintiffs-Appellees.

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Trans World Airlines, Inc. appeals, pursuant to 28 U.S.C. §1292(b), from summary judgment by the United States District Court, Southern District of New York, Charles L. Brieant, Jr., *Judge,* 393 F.Supp. 217 (1975) deciding that the airline was liable under the Warsaw Convention, 49 Stat. 3000 (1934). The District Judge was correct in holding that a terrorist attack was committed "in the course of . . . the operations of embarking . . .", Article 17, Warsaw Convention, 49 Stat. 3000 (1934).

Affirmed.

JOHN N. ROMANS, Esq., New York, N.Y. (Chadbourne, Parke, Whiteside & Wolff, New York, N.Y., P. G. Pennoyer, Jr., Esq., Charles K. O'Neill, Esq., Hilton H. Stothers, Jr., Esq., of counsel), *for Appellant Trans World Airlines, Inc.*

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KAUFMAN, *Chief Judge:*

On August 5, 1973, at Hellenikon Airport in Athens, Greece, two Palestinian terrorists hurled three grenades and unleashed a salvo of small-arms fire into a line of passengers preparing to board TWA Flight 881 to New York. Three people died and more than forty others were injured by this senseless act of violence.

The Warsaw Convention,[1] as modified by the Montreal Agreement,[2] provides, among other things, that an airline is absolutely liable,[3] to the extent of a maximum $75,000, for bodily injury sustained "in the course of any of the operations of embarking."[4] We are called upon to decide whether, under these provisions, TWA must provide indemnification for the deaths and injuries sustained at Athens. Our conclusion is that TWA must be held liable and that this determination accords with the plain meaning and the underlying purpose of the Warsaw provisions.

I.

It is necessary that we briefly describe the boarding procedures for international flights at Hellenikon Airport in August, 1973 as an aid to the resolution of the controversy before us. The prospective passenger, after entering the terminal, proceeded to the check-in counter of the airline whose aircraft he was to utilize. There, he

1 The Warsaw Convention is officially denominated "Convention for the Unification of Certain Rules Relating to International Transportation by Air." Concluded at Warsaw, Poland on October 12, 1929, the Convention is reproduced (in an English translation of the official French version) at 49 Stat. 3000 (1934).

2 Agreement CAB 18900 (1966).

3 There is an exception, not relevant in this case, for contributory negligence.

4 Warsaw Convention, Art. 17.

presented his ticket, deposited his luggage, and paid the departure tax. In return, he was given a boarding pass and baggage check. The passenger then passed through Greek passport and currency control after which he descended a flight of stairs into the Transit Lounge. Only passengers waiting to board international flights were allowed inside the lounge area where they were required to remain until boarding. While the traveler waited for his flight to be called, he secured his seat assignment at the transfer desk located inside the lounge. When his flight was announced, he proceeded to the designated departure gate, where he and his hand baggage were searched by Greek policemen. The passenger then walked through the doors of the terminal building and crossed a short terrace outside. Finally, he boarded a bus which transported him to the waiting airplane.

The attack on the passengers of TWA Flight 881 occurred after they had gone through several of the required steps recited above and while they were standing in line at the departure gate, to which a TWA representative had summoned them, waiting to be searched. After seven passengers had been searched, the terrorists made their assault upon those standing in line.

As a result of this tragedy, several of the injured passengers and the executrix of a passenger who had died, brought suit against TWA in the Southern District of New York.[5] 28 U.S.C. §§1331, 1332. They claimed that the airline was liable under the Warsaw Convention for the injuries sustained and the death. After several cases were consolidated, the plaintiffs and the defendant moved for

5 At the time of the attack, plaintiffs Aristedes and Constantine Day were being escorted by a TWA passenger relations agent to the departure gate. All the other plaintiffs were standing in line waiting to be searched. We agree with Judge Brieant that these differences in locations have no significance to the outcome of this case.

summary judgment on the issue of liability. Judge Brieant, in a thoughtful and thorough opinion, 393 F.Supp. 217 (S.D.N.Y. 1975), granted the plaintiffs' motion. He also issued a certificate pursuant to 28 U.S.C. §1292(b), and this interlocutory appeal followed.

II.

Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[6]

Under the Montreal Agreement, liability for injuries described by Article 17 of the Warsaw Convention became absolute and the maximum damages were increased to $75,000. It is undisputed, moreover, that a terrorist attack is considered an "accident" within the purview of these provisions. *See Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973 (*per curiam*). Thus, the sole issue we must resolve is whether the passengers sustained their injuries "in the course of any of the operations of embarking or disembarking."

TWA contended, both before Judge Brieant and on this appeal, that the application of Article 17 should be determined by reference only to the area where the accident occurred. Liability under the Convention should not attach, it urges, while the passenger is inside the terminal building. The very earliest time at which liability can

6 The official version in French, is reproduced at II Conférence Internationale de Droit Privé Aérien (1930) [hereinafter "Warsaw Minutes"].

commence, the appellant argues, is when the passenger steps through the terminal gate. Judge Brieant, however, believed that "the issue . . . is not where [the plaintiff's] feet were planted when the killing began, but, rather, in what activity was he engaged." 393 F.Supp. at 220. Applying a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location, the district judge determined that Article 17 covered the attack at the departure gate. We agree with this conclusion.

It seems elementary to us that the language employed in Article 17 must be the logical starting point. *See* Article 31(1), Vienna Convention on the Law of Treaties [hereinafter "Vienna Convention"]. We are of the view that the words "in the course of any of the operations of embarking" do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location. Rather, the drafters of the Convention looked to whether the passenger's *actions* were a part of the operation or process of embarkation, as did Judge Brieant.[7]

It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the "operations of embarking" commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the air-

7 The French word "opération" contained in the official version of the Warsaw Convention connotes a process composed of many acts. It is defined in the Nouveau Petit Larousse (1950) as "Ensemble de moyens que l'on combine pour en obtenir un resultat," or "a group of procedures combined to achieve a result."

craft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were "in the course of embarking."[8]

Moreover, a relatively broad construction of Article 17, affording protection to the plaintiffs under the Warsaw liability umbrella, is in harmony with modern theories of accident cost allocation. The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become "accident" victims. *See* G. Calabresi, The Costs of Accidents at 39-45 (1970) [hereinafter "Calabresi"]. Equally important, this interpretation fosters the goal of accident prevention. *Cf. Union Oil Co.* v. *Oppen*, 501 F.2d 558, 569-70 (9th Cir. 1974). The airlines, in marked contrast to individual passengers, are in a better posture to persuade, pressure or, if need be, compensate airport managers to adopt more stringent security measures against terrorist attacks. *Cf.* Calabresi at 150-52. If necessary, the airlines can hire their own security guards. And, the

8 We find *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971), cited to us by the appellant, clearly distinguishable. In *MacDonald*, the court declined to construe Article 17 as covering an elderly passenger who fell after disembarking. Mrs. MacDonald was, at the time of her accident, standing near the baggage "pickup" area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation. We do not, of course, indicate any views on the correctness of the *MacDonald* decision.

companies operate under circumstances more conducive to investigating the conditions at the airports they regularly serve than do their passengers. Moreover, they can better assess the probabilities of accidents, and balance the reduction in risk to be gained by any given preventive measure against its cost.

Finally, the administrative costs of the absolute liability system embodied in the Warsaw Convention, as modified by the Montreal Agreement, are dramatically lower than available alternatives. If Article 17 were not applicable, the passengers could recover—if at all—only by maintaining a costly suit in a foreign land against the operator of the airport. The expense and inconvenience of such litigation would be compounded by the need to prove fault and the requirements of extensive pretrial investigation, travel, and other factors too difficult to anticipate. Such litigation, moreover, would often unduly postpone payments urgently needed by the seriously injured victim or his surviving dependents. *See* Rosenberg and Sovern, *Delay and Dynamics of Personal Injury Litigation,* 59 Colum. L.Rev. 1115 (1959).

III.

TWA does not seriously challenge the validity of these textual and policy arguments in favor of extending coverage under the Warsaw Convention to the victims of the Athens attack. It contends, however, that this result is foreclosed by the legislative history of the Convention. This history, the airline claims, establishes that the framers intended to exclude from coverage all accidents occurring anywhere inside a terminal building. TWA correctly states that in interpreting a treaty we may look to its legislative history. *See, e.g., Cook* v. *United States,* 288 U.S. 102 (1933); *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 336-38 (5th Cir. 1967); *cf.* Harvard Research in

International Law, Law of Treaties: Draft Convention with Comment, Article 19 (1935) [hereinafter "Harvard Research"]; McNair, Law of Treaties at 411-23 (1961). We find, however, that, rather than undermining Judge Brieant's conclusions, the history of the Warsaw treaty bolsters them.

The Warsaw Convention was the product of two international conferences, one held in Paris in 1925, and another in Warsaw in 1929.[9] The Paris conference appointed a small committee of experts, the Comité Internationale Technique d'Experts Juridique Aériens (CITEJA), to prepare a draft convention for consideration by the delegates at Warsaw. The version proposed by CITEJA would have extended accident coverage to passengers

> from the time when [they] enter the airport of departure until the time when they exit from the airport of arrival.

Warsaw Minutes at 171.[10]

At the Warsaw conference, several of the delegates criticized this draft. Alcibiades Peçanha, the Brazilian delegate, proposed that Convention liability not attach until the passengers were actually inside the aircraft. Warsaw Minutes at 49. Prof. Georges Ripert, the French delegate, however, forcefully argued against both the CITEJA and the Brazilian proposals. It was, he observed, virtually impossible to draft a precise formula that would

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9 The history of the Warsaw Convention is discussed in Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967) [hereinafter "Lowenfeld and Mendelsohn"]; and in Ide, *The History and Accomplishments of the CITEJA,* 3 J. Air L. 27 (1932).

10 The original minutes are in French; we quote this clause in the translation provided in TWA's brief and certified by Prof. M. Riffaterre of Columbia University.

satisfactorily cover the myriad of cases that could arise. Prof. Ripert proposed that the article be recast in terms broad enough to allow the courts to take into account the facts of each case. *See* Warsaw Minutes at 49-50, 53-54.[11] The delegates voted to reject the CITEJA draft[12] and to accept the French suggestion. *Id.* at 57. The drafting committee then rewrote the CITEJA proposal in the form now set forth in Article 17.

The minutes of the Warsaw proceedings thus undermine TWA's contention that the delegates wished to implement a rigid rule based solely on location of the accident. Rather, we believe they preferred to provide latitude for the courts to consider the factual setting of each case by considering the elements we have referred to above.

IV.

Those called upon to construe a treaty should, in the words of Judge Clark, strive to "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov* v. *United States*, 299 F.2d 565, 568 (2d Cir. 1962), *aff'd* 373 U.S. 49 (1963). These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its crea-

11 Prof. Ripert has been referred to as "the dean of French writers on civil law." Lowenfeld, Aviation Law, VI-16 (1972).

12 TWA argues that the rejection of the CITEJA draft manifested an intent to exclude from Warsaw coverage *all* accidents occurring within a terminal building. We disagree. It is our view that the delegates' action constituted a rejection of a rigid location-based test in favor of the more flexible approach espoused by Prof. Ripert.

Even if we were to disregard this legislative history, the most we could infer from the rejection of the CITEJA formula would be a reluctance to cover *all* accidents occurring inside a terminal, not a determination that *no* such accidents should be covered.

tion is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787. Justice Holmes's counsel concerning Constitutional construction, set forth in his opinion in *Missouri* v. *Holland*, 252 U.S. 416, 433 (1920), applies with equal force to the task of treaty interpretation:

> [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions. *See Pigeon River Improvement Slide & Boom Co.* v. *Cox*, 291 U.S. 138, 158-63 (1934); *Husserl* v. *Swiss Air Transport Co., supra;* Harvard Research, Article 19; M. McDougal, H. Lasswell and J. Miller, The Interpretation of Agreements and World Public Order 56, 58 (1967); II. C. Hyde, International Law 72 (1922); Vienna Convention Art. 31(3).[13]

In divining the purposes of the Warsaw treaty, we find the adoption in 1966 of the Montreal Agreement particularly instructive. This Agreement did not alter the language of Article 17 of the Warsaw Convention. But it provides decisive evidence of the goals and expectations currently shared by the parties to the Warsaw Convention.

13 We find Prof. Hyde's words especially relevant:

> A court might even feel obliged to sustain [the parties' later] construction of a treaty differing widely from that which it was in fact possible to prove to have been the design of the parties at the time when the agreement was concluded.

II Hyde, *supra*, at 72. In so acting, the court does not, of course, impose its own values upon the parties. Rather, the court does no more than respect and implement the goals and intentions of the parties.

The Montreal Agreement was adopted in response to a torrent of criticism of the stringent Warsaw limitations of liability.[14] For example, in August, 1965, Senator Robert Kennedy suggested on the Senate floor that the United States should consider denouncing (i.e. withdrawing from) the Warsaw convention. "Over 2 million Americans travel annually on international flights," he stated.

> Assuring that they and their families are adequately protected in case of accident is, consequently, a matter of widespread importance . . . No one questions the fact that the protection now afforded international travelers is woefully inadequate.

111 Cong. Rec. 20164 (1965).

On November 15, 1965, the State Department filed formal notice of denunciation of the Warsaw treaty, to take effect six months later. An accompanying press release stated that the United States would be prepared to withdraw its denunciation if the principal international air carriers agreed to raise the liability ceiling to $75,000 and if there was a reasonable prospect that the Convention would be formally amended to incorporate this modification. 50 Dept. State Bull 923 (1965).

The Warsaw signatories were, needless to say, not unduly sanguine about the vitality of the Warsaw treaty absent the world's largest aviation power. Accordingly, on May 13, 1966, after months of intense negotiation, the world's major airlines, virtually without exception, signed what became known as the Montreal Agreement. Under the terms of this agreement, each airline filed a special contract with the Civil Aeronautics Board raising the lia-

14 *See generally* Lowenfeld and Mendelsohn; Lowenfeld, *supra* note 11, Chapter 6; and 1. L. Kriendler, Aviation Accident Law, Chs. 11-12A (1971). The Warsaw convention limited liability to $8300 and provided the airline with a defense of due care.

bility limit to $75,000 on all flights to, from, or stopping over in the United States. It is important to note, in addition, that the carriers also agreed to waive the defense of due care. Liability was to become absolute unless the passenger himself were at fault.

It cannot be doubted, therefore, that the Warsaw Convention now functions to protect the passenger from the many present-day hazards of air travel and also spreads the accident cost of air transportation among all passengers.[15] *Husserl* v. *Swiss Air Transport Company, Ltd.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (per curiam). This is amply demonstrated by the imposition of absolute liability and the establishment of greatly increased limits of liability. The official statements made by the State Department, the prime mover behind the Montreal modifications, reinforce this conclusion.[16] Thus, the official notification of withdrawal of denunciation stated that

> the conditions which led the United States to serve its notice of November 15 have substantially changed. Accordingly, the United States of America believes

15 Although it was the foreign airlines, and not their respective governments, who signed the agreement implementing these modifications, the governments whose carriers were to participate in the plan formally assured the United States, at the request of the State Department, that they would permit the new plan to go into effect. Lowenfeld and Mendelsohn at 594, 595. In assessing the expectations of these foreign governments, we also find the 1971 Guatemala Protocol significant. That protocol, adopted by a diplomatic conference at which 55 countries were represented, has been signed to date by more than 20. The protocol will formally amend the Warsaw treaty in a manner similar to the Montreal Agreement to provide for absolute liability up to $100,000. *See* Lowenfeld, *supra*, at §6.2; Mankiewicz, *The v971 Protocol of Guatemala City*, 38 J. Air. L. 519 (1972).

16 Indeed, our government's concept of the goals of a treaty must be given great weight even if the other parties hold a different view of its meaning. *See Factor* v. *Laubenheimer*, 290 U.S. 276, 298 (1933).

> that its continuing objectives of . . . adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention.

Quoted in Dept. of State Press Release No. 111, 54 Dept. of State Bull 955-57 (1966).

We conclude, in sum, that the protection of the passenger ranks high among the goals which the Warsaw signatories now look to the Convention to serve.[17] We would

17 TWA, citing several treatises and articles, e.g., Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air L. 1, 20 (1936), contends that "authorities the world over" hold that Warsaw coverage is defined by location and does not extend to accidents occuring inside a terminal building. The simple answer to this argument is that the commentators are far from uniform. Shawcross and Beaumont, in their treatise on *Air Law* (3rd ed. 1966), state that coverage extends throughout "the time during which the passenger's movements are under the control of the carrier for the purposes of embarking" and suggest that this includes "injury . . . while leaving the passenger building." *Id.* at 441-42. Mateesco Matte, similarly, states that coverage begins when the passengers are taken in charge by the airline. N. Mateesco Matte, *Traité de Droit Aérien-Aeronautique* at 404-05 (1964). De Juglart regards Article 17 as possibly providing coverage for at least some events occuring within the terminal building. M. de Juglart, *Traité Elementaire du Droit Aérien* at 330 (1952) (Preface by G. Ripert). *Accord*, Heller, *Proposed Revision of Article 17 of the Warsaw Convention*, 20 Int & Comp. L.Q. 142, 146 (1971). And, the Court of Appeal of Berlin, in *Blumenfeld* v. *BEA*, 11 ZLW 78 (1962), has held that Article 17 covers a passenger who falls down a staircase leading from the terminal to the traffic apron. The court, significantly, stated that the Convention applies because

> the air carrier already *commits the flight passengers under his care* when he *requests* them to go from the waiting room to the aircraft. [Emphasis added]

We note, moreover, that most of the texts and commentaries cited by TWA date from the 1930's; virtually all were written before 1965. They thus antedate the 1965 United States denunciation and the subsequent Montreal Agreement. The writers of these early treatises, moreover, could foresee neither the advent of air terrorism nor the radical changes in boarding procedures that the ensuing years would bring. Additionally, the purported goal of worldwide uniformity could not have been paramount in the minds of the framers of Article 17, for they contemplated a case-by-case application by the courts that would, to some extent at least, rely on local law.

add, however, that, even if we restricted our interpretation to the intent and purposes of the Warsaw treaty as of 1929, we would reach the same result.

Since 1929, the risks of aviation have changed dramatically in ways unforeseeable by the Warsaw framers.[18] Air travel hazards, once limited to aerial disasters, have unhappily come to include the sort of terrorism exemplified by the Athens attack. As that incident graphically demonstrates, these new perils often spill over into the airline terminal.

The Warsaw drafters wished to create a system of liability rules that would cover all the hazards of air travel. *Cf.* Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. Air L. 1, 20 (1936); Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air L. 217 (1959). The rigid location-based rule suggested by the appellant would ill serve that goal. Under TWA's test, many claims relating to liability for the hazards of flying would be excluded from the Warsaw system and would be governed by local law. Rather than serving the drafters' intent of creating an inclusive system, appellant's proposal would frustrate it.

We believe, moreover, that the result we have reached furthers the intent of the Warsaw drafters in a broader sense. The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they

18 Some commentators have suggested that when confronted with such genuine gaps in the parties' expectations, the interpreter should consider accepted policy goals, such as accident prevention, in filling them. *See*, e.g., McDougal, *supra*, at 260-61.

It is relevant in this connection that the technology of embarkation has also changed in ways unforeseeable to the Warsaw delegates. Moreover, airports are today far larger and boarding procedures substantially more complex than forty-six years ago. And, many of the operations of embarking have been moved inside the terminal building. Indeed, even the boarding ladder, now being increasingly replaced by the jetway, may soon become an anachronism.

could not foresee. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. Our holding today confirms the framers' belief that the ever-changing needs of the system of civil aviation can be served within the framework they created.

Accordingly, we affirm.

Judgment of U. S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of December, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN
Chief Judge
HON. J. JOSEPH SMITH
HON. WILFRED FEINBERG
Circuit Judges,

75-7341

Aristedes A. Day, Theodora Day and Constantine Day, individually and Aristedes A. Day and Theodora Day parents of Constantine Day,

Plaintiffs-Appellees,

v.

Trans World Airlines Inc.,

Defendant-Appellant.

Kate Kersen, individually and as Administratrix and Administratrix Ad Prosequendum of the Estate of Elbert Kersen, deceased,

Plaintiff-Appellee,

v.

Trans World Airlines Inc.,

Defendant-Appellant.

Judgment of U. S. Court of Appeals.

John Spiridakis, Bessie Spiridakis, Leonard Lazarus, Shirley Lazarus, Arnold Rose and Helen Rose,
Plaintiff-Appellee,

v.

Trans World Airlines Inc.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

JUDGMENT ENTERED—
1/21/76

RAYMOND F. BURGHARDT
Clerk

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Opinion of the U. S. District Court

DAY v. TRANS WORLD AIRLINES, INC.
Cite as 393 F.Supp. 217 (1975)

MEMORANDUM DECISION

BRIEANT, District Judge.

These actions are brought by plaintiffs, international passengers on defendant airline ("TWA") to recover damages for personal injuries sustained during a terrorist attack in the transit lounge at Hellenikon Airport, Athens, Greece on August 5, 1973. Plaintiffs allege, *inter alia*, liability without fault under the provisions of the Warsaw Convention, 49 Stat. 3000 et seq. (1934), as modified in accordance with the Montreal Agreement (1966). Plaintiffs moved pursuant to Rule 56, F.R.Civ.P. for summary judgment on the issue of absolute liability.[1] Defendants also moved for summary judgment on that issue of liability, and oppose plaintiffs' motion.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

There is no genuine issue with respect to the following facts. The United States and Greece are adherents to the Warsaw Convention, and TWA is a signatory to the Montreal Agreement. TWA is a common carrier engaged in transporting passengers between New York, New York and Athens, Greece.

Plaintiffs, or those in whose right they sue, were passengers in international transportation as defined by Warsaw [Article 1(2)] and ticketholders on TWA's Flight

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[1] There are pendent claims pleaded charging negligence or similar theories, apparently having little factual basis. The airport was not owned or controlled by TWA, but by the Greek Government, which made it available to other airlines equally.

881/5, scheduled to depart Athens at 3:30 P.M. Athens time.[2]

On August 5, 1973, at approximately 3:00 P.M. Athens time, passengers for TWA Flight 881/5, bound for New York, were assembled in the transit lounge of Hellenikon Airport in the vicinity of Gate 4 and were lining up for the hand baggage check and physical search conducted by the local Greek police prior to boarding. At 3:10 P.M., after approximately seven passengers had been screened and had passed through Gate 4 to buses which would transport passengers for this flight to the TWA airplane that was parked on the traffic apron, two or more terrorists commenced a violent attack on the passengers and others in the transit lounge. The terrorists threw three grenades in rapid succession which exploded in the vicinity of the lines of passengers which had formed for final processing for boarding the TWA flight. They followed this with several gunshots fired into the crowd at random. The terrorists took up a position behind a bar in the transit lounge and held 32 people as hostages. At approximately 5:20 P.M., after lengthy, tense and strident negotiations with the local officials, the terrorists surrendered and were arrested. The toll of this afternoon of terror: approximately 40 TWA passengers wounded; two TWA passengers died immediately and a third died several days later; a passenger of another airline died immediately; four TWA employees were injured; and an undetermined number of passengers and employees of other airlines were wounded.

Subsequent investigations revealed that the perpetrators were two members of the "Black September" organization, Shafik El Arid, also known as Mohamed Zehod, age 21, a native of Jordan, and Talaat Khantouran, also known as Hussein Talaat, age 21, also a native of Jordan.

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[2] Hereinafter, for convenience, we use the term "plaintiffs" to mean "injured passengers" in the context of this case.

They were not TWA passengers. Following the all too common scenario for such incidents, in their negotiations following the attack the terrorists sought an aircraft to take them to a "friendly country" and threatened to kill the hostages absent instant gratification. In later statements to the police and at their arraignment, the terrorists admitted that they planned to attack "Israel immigrant passengers on TWA flights going to Tel Aviv but by mistake struck when [these other] passengers were actually boarding the New York bound flight." They conceded their membership in the Black September terrorist organization and that they were acting pursuant to the instructions of that group.

Regardless of their stated purpose, an obvious goal of this frightful conduct is to seek international publicity at the expense of innocent victims unknown to the organization. The passengers on Flight 881/5 were for the most part United States citizens who had been vacationing in Greece.

The flight ultimately departed carrying only seven passengers who had completed their clearance before the incident, and were available, when the local police released the aircraft at 5:30 P.M. Athens time; this out of 82 passengers, including the plaintiffs, who had checked in for the flight.

Prior to the incident, plaintiffs, individually, had presented their tickets at the TWA checking desk located on the upper level of Hellenikon Airport. There, a TWA agent processed their tickets, issued boarding passes, assigned seats by number and issued baggage checks. Pursuant to TWA's instructions, plaintiffs proceeded through passport and currency control, also on the upper level, and thereafter to the transit lounge on the lower or field level to await the search of their persons and carry-on luggage. Once a passenger is in the lounge he may not leave that

area unless he again clears passport and currency control on the upper level.

Before the incident, TWA announced that Flight 881/5, was ready for departure. Plaintiffs were told by TWA personnel to form a line at Gate 4 for the searches above-mentioned. Plaintiffs along with the other passengers were then to proceed through the lounge to a bus, owned and operated by Olympic Airways, which was to take them approximately 100 yards across the traffic apron to their plane.[3]

Plaintiff Helen Rose had passed through the search area when the attack occurred. Aristedes and Constantine Day, escorted by a TWA passenger relations agent were told to proceed with this agent to the plane just before the incident took place. All other plaintiffs at Gate 4 were standing in line to be searched. In the Court's view of the case, these minor differences are not outcome determinative. The issue as to any plaintiff is not where his feet were planted when the killing began, but rather in what activity was he engaged.

Article 17 of the Warsaw Convention provides that:

> "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or *in the course of any of the operations of embarking* or disembarking." (Emphasis added)

TWA's position on this motion is that when the attack occurred plaintiffs were not "in the course of any of the operations of embarking", as that phrase is understood under the Convention, and therefore, as a matter of law,

[3] The bus served all airlines, and its operation and control was not that of TWA.

TWA is not liable. That the terrorist activities in the circumstances of this case constituted an "accident" is not disputed. The precise meaning of the terms of a statute or treaty is a question of law. See generally Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 392, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) (Warsaw Convention).

The Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), was adopted in 1929 following several international conferences among the aeronautical powers. The industry was in infancy; Lindberg had flown the Atlantic in 1927 and Earhart in 1928. Substantial perils of all kinds were envisioned. Accordingly, capital was difficult to secure for this infant industry, because of the risks of loss attendant upon unlimited tort liability. To remedy this perceived difficulty, a plan to limit liability imposed on an airline for accidents was adopted, at the Warsaw Convention.

The Warsaw Convention "functions to redistribute the costs involved in air transportation." Husserl v. Swiss Air Transport Company, Ltd., 351 F.Supp. 702, 707 (S.D. N.Y.1972), aff'd per curiam, 485 F.2d 1240 (2d Cir. 1973). The carrier is in a position to negotiate with the owner or operator of an international air terminal to develop security mechanisms to protect air travellers from terrorist attack. Airport operators have demonstrated their ability and willingness to adapt to technological innovations made necessary by the high incidence of "skyjackings", and in cooperation with the airlines, similar protections might be developed to protect air passengers while they are on the ground. Airlines are also in a better position to be able to bear the losses incurred as a result of airport violence. Carriers might seek insurance coverage that would distribute the cost over a great number of carriers and, consequently, their passengers. See Pan American World

Airways, Inc. v. Aetna Casualty & Surety Co., 368 F.Supp. 1098 (S.D.N.Y.1973), aff'd, 505 F.2d 989 (2d Cir. 1974). The airline industry in the United States is a regulated industry which has relatively uniform tariffs and fares, and, assuredly, such additional costs would be passed along to air passengers. Although the problem of terrorist attack was not anticipated by the drafters of the Convention, it is to be assumed that a treaty designed to deal with the hazards of modern air travel would be sufficiently flexible to encompass this most recent hazard.

The Convention essentially created a presumption of liability on the part of the air carrier for injury or death arising out of international transportation, without proof of fault, subject to certain defenses, and a concomitant limitation of liability to $8,300.00 per passenger. The United States, although not a signatory to the Convention, commenced adherence in 1934 pursuant to presidential proclamation. 1 L. Kreindler, Aviation Accident Law, § 11 (1971 ed.)[4]

The Warsaw Convention does not expressly define the terms used in Article 17. The court must look to the

[4] The Hague Protocol proposed and signed in 1955 which amended the Warsaw Convention was never ratified by the United States. The United States determined later that the $8,300.00 limit imposed by the Convention was insufficient, and on November 15, 1965 the United States filed articles of denunciation of the Convention to become effective within six months. On May 14, 1966, the United States withdrew its notice of denunciation and announced its approval of an interim agreement, known as the "Montreal Agreement." Under this agreement, parties thereto would include in their tariffs to be filed with the Civil Aeronautics Board a special contract by which the carrier would waive those defenses provided by Article 20(1) of Warsaw and increase its limitation of liability under Warsaw to $75,000.00. It is important to emphasize that the Montreal Agreement did not in any way change the text of the Warsaw Convention. See generally, Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv.L.Rev. 497 (1967).

ordinary meaning of the treaty's terms. For the ordinary meaning of the relevant phrase "in the course of any of the operations of embarking" we begin with Funk & Wagnalls New Standard Dictionary of the English Language (1949). "Course" is defined as "the act of moving onward or forward in a certain direction;" "operation", as "a course or series of acts to effect a certain purpose;" and "embarking," as "to go aboard a vessel or a boat."

A consideration of the plain meaning of the words "in the course of any of the operations of embarking" produces a single conclusion. These passengers could not board the aircraft unless they:

1. presented their tickets to TWA at the checking desk on the upper level;
2. obtained boarding passes from TWA;
3. obtained baggage checks from TWA;
4. obtained an assigned seat number from TWA;
5. passed through passport and currency control imposed by the Greek Government;
6. submitted to a search of their persons for explosives and weapons by Greek police;
7. submitted their carry-on baggage for similar inspection by Greek police;
8. Walked through Gate 4 to Olympic's bus;
9. boarded the bus;
10. rode in the bus a distance of 100 yards; and
11. walked off the bus and onto the aircraft.

There is simply no other way to "embark," except by these eleven steps. None of these pursuits above-named were being conducted for the personal convenience of the pas-

sengers, nor did any of them constitute frolic and detour. When they were injured they had completed five out of eleven steps, each absolutely essential. Without any one, a passenger could not "embark" upon the aircraft.

Of course, when the Convention was drafted, we lived in a simpler day. Many airlines required nothing more than to weigh the passenger and his luggage, take his ticket and allow him to place his foot on the boarding ladder. The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times. Regardless of whose real estate he was standing on at the time of the terrorist attack, under the circumstances of this case, any person who had accomplished as many as five out of the above mentioned eleven essential acts without which it would be impossible to travel on the flight, within an uninterrupted time sequence, and was perforce lined up to perform the balance of the required acts sequentially, is within the plain meaning of the clause above quoted. TWA would have refused to carry any passenger until he completed substantially all of the above-enumerated acts in the order listed.

Apart from the "plain meaning" test, it is helpful to examine the underlying purpose of the Convention and to interpret its provisions to effectuate that purpose. For this, we may look to the diplomatic and legislative history of a treaty to determine its correct interpretation. Choctaw Nation v. United States, 318 U.S. 423, 63 S.Ct. 672, 87 L.Ed. 877 (1943); Factor v. Laubenheimer, 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315 (1933); MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971). Treaties are to be liberally construed so as to carry out the intention and purpose of the parties. See DeTenorio v. McGowan, 364 F.Supp. 1051 (S.D.Miss. 1973).

The original draft of the Convention contained a single provision concerning carrier liability for passengers, goods

and baggage. As initially drafted, carrier liability extended from the time the passengers, goods and baggage entered the airport of departure until they departed from the airport of arrival. There was no disagreement concerning these proposals insofar as they related to goods and baggage; however, the delegates declined to impose such extensive carrier liability for passengers. Thus a logical distinction appeared between passengers and property. Article 17 was drafted to reflect a more limited approach to the protection of passengers. Because passengers have volition, and can get themselves into situations of peril which inanimate articles such as goods and baggage cannot do, liability should be limited to those times when a passenger is exposed to the dangers of aviation. Although most accidents occur while passengers are on board the aircraft, it is obvious that a passenger may be exposed to certain risks inherent in aviation before he actually boards the plane, and after he has left the plane. It was a reasonable structure to provide by Article 17 that carrier liability be extended to accidents which take "place on board the aircraft or in the course of any of the operations of embarking or disembarking." Sullivan, Codification of Air Carrier Liability by International Convention, 7 J. of Air Law 1, 18-22 (1936).

Under modern conditions of international air travel, the period between the moment a passenger enters the airport until he is safely aboard the aircraft often comprises a substantial amount of time and effort, much of which may be said reasonably to constitute embarking. The Convention rejected liability for passenger injury during this entire period. Instead, it established a test, based on a purposeful activity, "embarking". Occasionally, it may be unclear when liability was to attach; no clear line was drawn, as could have, perhaps been done. However, "the great body of law consists in drawing such lines, yet when

you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall." Schlesinger v. Wisconsin, 270 U.S. 230, 241, 46 S.Ct. 260, 262, 70 L.Ed. 557 (1926) (Holmes, J. dissenting).

This Court should not attempt to draw such a line or formulate an inflexible rule regarding air carrier liability which will apply every time an airport is bombed by criminals. We restrict ourselves to the totality of the circumstances affecting these plaintiffs, viewed against the background of the plain meaning of the Convention, coupled with a consideration of its historical purpose.

We distinguish readily the case of Felismina v. Trans World Airlines, Inc., 13 Av.Cas. 17,145 (S.D.N.Y. June 28, 1974), which involves a claimed disembarking. A passenger who has left the aircraft, unlike plaintiffs is not herded in lines, and has few activities if any, which the air carrier *requires* him to perform at all, or in any specific sequence as a condition of completing his journey. The plaintiff in *Felismina, supra,* was not standing in line in connection with disembarking, and was not performing any acts required by the airline as a condition of travel. She was injured on equipment negligently maintained by third parties.

Although the instant motion is directed at the liability imposed by international treaty, principles of common law tort liability are instructive for purposes of comparison. Stated broadly, "[a] common carrier of passengers is not an insurer of the safety of its passengers though it is bound to use a high degree of care for their safety." Nieves v. Manhattan and Bronx Surface Transit Operating Authority, 31 A.D.2d 359, 297 N.Y.S.2d 743 (1st Dept. 1969). Under common law principles, the duty of care owed by a common carrier was not limited to the time in which the passenger was actually on board the carrier, and extended

to the time spent by the passenger in the carrier's terminal. Furthermore,:

> "[t]he duty of a carrier to keep in a safe condition all portions of its platforms and the approaches leading thereto to which the public is reasonably likely to go is extended to impose a similar duty upon a carrier using the station facilities or approaches of another for its own passengers. So imperative is the duty of a carrier to provide a safe means of access to and exit from its terminal grounds that such duty, it is generally held, cannot be delegated to another. In some instances, however, the carrier's lack of control over the defective premises has been held to preclude liability on its part, the accident resulting in injuries not being one which could have been reasonably foreseen by such carrier." 7 New York Jurisprudence, Carriers § 333 at 291-92.

The carrier's duty to a passenger waiting at his station is not limited to providing a safe structure, "but also requires the exercise of reasonable care to prevent danger from vicious practices of third parties, of which the carrier has knowledge or a reasonable opportunity for knowledge if reasonable care is taken." *Id.* § 332 at 291.

The Court concludes as a matter of law that the aforementioned injuries were incurred as a result of an accident during the course of embarking and are actionable under the Warsaw Convention as supplemented by the Montreal Agreement.

Plaintiffs' motion for summary judgment on the issue of liability is granted; defendant's motion for summary judgment dismissing the claim is denied.

This Court recognizes that the issue of liability in these cases is one of first impression. It seems wasteful of the resources of plaintiffs, defendant, and the Court to proceed immediately to a trial of the issues of damages, which un-

doubtedly could be adjusted by settlement and compromise if the question of liability were resolved with finality. An immediate appeal from the order to be entered may advance materially the ultimate termination of all of the cases above entitled, and three additional cases [Maropis, et al. v. TWA, 73 Civ. 4297-CLB, Koutsovitis, et al. v. TWA, 74 Civ. 612-CLB and Arapolgiannis, et al. v. TWA, 74 Civ. 716-CLB] also arising out of the same accident.

If requested by the defendant to do so, the Court will stay all further proceedings in these cases and certify the question for purposes of an interlocutory appeal under 28 U.S.C. § 1292.

Counsel for any party, if so advised, may submit a proposed statement of the question to be certified pursuant to Rule 5, F.R.App.P., which may be set forth in the order determining the motion.

APPENDIX C

Evangelinos et al. v. Trans World Airlines, Inc. (W.D. Pa. 1975).

Constantine Evangelinos et al.,
Plaintiffs,

v.

Trans World Airlines, Inc.,
a corporation, Defendant.

Civ. A. No. 74-165.

United States District Court,
W. D. Pennsylvania.
June 12, 1975.

Opinion and Order

Snyder, District Judge.

Callioppi Evangelinos and her children, Constantine, Erma, Stella, and Mary Julia (Plaintiffs) purchased round trip air transportation reservations from Trans World Airlines, Inc., (TWA) from Pittsburgh, Pennsylvania through New York City to Athens, Greece, and return. While the Plaintiffs were awaiting to board return TWA Flight 881[1] in Athens in the boarding area, the peace and quiet of the scene was broken by a terrorist attack when two armed men threw hand grenades, followed by gunshots fired at random into the crowd. Then the attackers took up a position behind a bar in the Transit Lounge and held thirty-two people as hostages. At approximately 5:20 P.M., after nearly two hours of negotiation with local offi-

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[1] "On August 5, 1973, the security procedures with respect to inspection of passengers and baggage for Flight 881 were administered by the Greek authorities. * * * Two TWA security guards were also present." (Defendant's Answer to Interrogatory No. 19).

cials, the terrorists surrendered and were arrested. The toll that afternoon included forty TWA passengers wounded; two TWA passengers died immediately and a third several days later; a passenger of another airline died immediately; four TWA employees were injured; and an undetermined number of passengers and employees of other airlines were wounded. The Plaintiffs herein were severely wounded by shrapnel or bullets.

Suit was brought against TWA on absolute liability based upon the Warsaw Convention as modified by the Montreal Agreement, and alternatively for negligence.

The Plaintiffs have filed a Motion for Partial Summary Judgment on the issue of absolute liability. Defendant has also moved for Summary Judgment on that issue of liability and opposes Plaintiffs' Motion.[2]

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.[3]

There is no genuine issue with respect to the basic facts which underlie the incident. TWA was engaged in the international air transportation of passengers and personal property between New York City, New York, and Athens, Greece. Both the United States and Greece are

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[2] The cause of action based on negligence is not in issue on the instant Motions for Summary Judgment.

[3] 28 U.S.C. § 1331 provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

signatories to the Warsaw Convention, more formally known as "A Convention for the Unification of Certain Rules Relating to International Transportation by Air",[4] and TWA is signatory to the Montreal Agreement,[5] more particularly discussed hereinafter.

On August 5, 1973, the Plaintiffs were driven to the Athens Airport by a relative and arrived at about 2:00 P.M. They reported to the check-in counter in the departure hall on the upper level, where their luggage was checked, ticket coupons were submitted and boarding passes were issued by TWA employees. They then proceeded to an area on the same level where their boarding passes and tickets[6] were checked and examined by the police and then they reported to passport and currency control where their passports were examined and stamped. They then proceeded down a set of stairs into the Transit Lounge on the lower level, entrance to which is restricted to passengers ticketed and scheduled to depart on international flights of the forty scheduled carriers operating out of the terminal and to other personnel, who are not passengers, needed to service the area. Gates 4 and 5 were normally used by TWA for their outgoing flights. The

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[4] For a thorough review of the Convention see the excellent discussion by Judge Wisdom in *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), *cert. denied* 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363 (1968).

[5] Civil Aeronautics Board Agreement 18900, Order Serial No. E-23680, May 13, 1966.

[6] The tickets contained the "Advice To International Passengers on Limitation of Liability" and the "Notice" which read in pertinent part as follows: "If the passenger's journey involves an ultimate destination or stop in a country other than the country of departure the Warsaw Convention may be applicable and the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage. . . ."

Transit Lounge was not partitioned into exclusive areas. The Plaintiffs went to the Transfer Desk in the Transit Lounge area where they obtained a seat assignment and then awaited the announcement of the boarding of their flight in order to report to Gate 4. At this Gate, there are two separate lines, one for males and one for females, where there is a handbag search and a physical search made by the Greek Police. There are tables for examination of hand luggage and behind the tables were located two booths for physical search of all persons intending to depart. After the search, passengers would proceed through double doors out of the Transit Lounge where they boarded buses for transportation to the aircraft stationed at some distance from Gate 4.

The Transfer Desk (where the seat assignments were handed out) was manned by TWA personnel, as well as employees of the other airlines that used the terminal. Two TWA Security Guards were stationed at Gate 4 as well as at least two passenger service personnel of TWA. After being physically searched, the passengers would have walked to two sets of exit doors which led from the Transit Lounge to a raised terrace attached to the terminal building. Two sets of stairs were located on the east side of the terrace leading to a waiting area where there was a bus operated by Olympic Airlines and intended to carry persons across the traffic apron a distance of approximately 250 meters to where the airplanes were parked for loading.

At the time of the attack, all eighty-nine passengers scheduled to board TWA Flight 881 had checked in and received their boarding passes. The Plaintiffs had completed the various steps required and began to queue up in two lines preparatory to proceeding through the hand baggage and physical searches. At the same time, there was being prepared, Flight 806 destined for Tel Aviv, and the Tel Aviv passengers were taken out of the Gate 4

lineup (the electrically controlled sign having erroneously shown Flight 806-Tel Aviv instead of Flight 881-New York).[7] These passengers were then taken through Gate

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[7] "At approximately 2:55 P.M., Athens local time, the boarding of TWA Flight 840, a flight through Athens to Tel Aviv had been completed with 121 passengers joining the flight at Athens and 21 through passengers on board. Due to the late arrival of the inbound aircraft, Flight 840 was in a multiple landing operation with Flight 806, another TWA flight through Athens to Tel Aviv, and also with the originating flight 881, a flight originating in Athens to New York. All three vehicles were parked on the traffic apron as shown at no. 19, Diagram A to the Enright Report.

15 passengers were then boarded on Flight 806 including a party of ten connecting passengers originally booked on Flight 840 who had arrived late and were being protected on Flight 806, that is, placed on a substitute flight going to the same destination. At approximately 3:00 P.M., a TWA ground hostess made an announcement over the loud speaker system that all persons awaiting Flight 881 were to proceed to Gate 4 which was located as shown on Exhibit B to the Stipulation. After this announcement, passengers, including plaintiffs, scheduled to board Flight 881 began to queue up in two lines, preparatory to proceeding through hand baggage and physical search. Upon hearing this announcement, Greek Airport personnel in another part of the building electronically changed the sign board over Gate 4 from 'TWA Flight 806 Tel Aviv' to 'TWA Fight 881-New York'. At that point, Marina Mastroyanni, a TWA customer service agent, who had been told that there were two transit passengers missing from Flight 806, bound for Tel Aviv, came to the transfer desk and made the announcement over the loud speaking system, 'immediate boarding of TWA Flight 806 to Tel Aviv at Gate 4.' Upon hearing this announcement, the airport personnel changed the sign over Gate 4 to read 'TWA Flight 806-Tel Aviv.' Miss Mastroyanni indicated at the time she made this announcement that she was missing two transit passengers from Flight 806 who had deplaned, apparently to go to the duty free shop. After making the announcement at the transit desk, Miss Mastroyanni returned to Gate 4 and asked the passengers who had been queued up there for Flight 881 if any of them were Tel Aviv passengers. She took three passengers out of line who were bound for Tel Aviv and took them to Gate 5 where Swiss Air had just completed boarding of a flight and she checked these Flight 806 passengers through Gate 5." (Memorandum of Plaintiffs in Support of Motion for Partial Summary Judgment, pp. 7 and 8).

5 where Swiss Air had just completed boarding of another flight.

Approximately seven Flight 881 passengers had departed through Gate 4, exited the Transit Lounge, and had either boarded or were about to board the bus previously referred to. The great maority of the eighty-nine scheduled passengers for Flight 881 were in line in front of the tables at Gate 4 at the time of the incident. The Plaintiffs were injured while being queued up in line in front of Gate 4 while waiting to be searched.

In statements made later to the police, the terrorists admitted that they had planned to attack "Israel immigrant passengers on TWA Flights going to Tel Aviv, but by mistake struck when the passengers were actually boarding the New York bound flight." They acknowledged membership in a Black September Terrorist Organization and were seeking international publicity.

The flight finally departed for New York carrying only the seven passengers who had completed clearance before the incident and were available when the local police released the aircraft at 5:30 P.M. Athens time.

The Warsaw Convention

(49 Stat. 3000, 49 U.S.C. § 1502 (Note))

In 1934, the United States became a party to the Warsaw Convention, a treaty subsequently signed by one hundred and seven nations, applying to "all international transportation of persons . . . performed by aircraft for hire. . . "[8] (Article 1(1)).

[8] The Warsaw Convention was signed by the representatives of 23 countries at Warsaw, Poland on October 12, 1929, and on October 29, 1934 President Roosevelt proclaimed adherence after the United States Senate had advised adherence on June 15, 1934.

It is clear that the overall obective of the Warsaw Convention was to provide uniform rules relating to air transportation documents such as tickets, baggage checks and air way bills, and to limit the air carrier's liability for an airplane accident. Article 17 of the Convention provides:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or *in the course of any of the operations of embarking or disembarking.*" (Emphasis supplied).

Article 22 of the Warsaw Convention limited damages to the maximum amount of $8,300 per passenger, thus limiting the amount of recovery that an injured or wounded passenger could secure on an international flight.

On November 15, 1965, the United States formally denounced the Warsaw Convention because of its dissatisfaction with the damage limitation of $8,300, feeling this was unduly prejudicial to American citizens travelling abroad on international flights.[9] Cancellation of United States' participation was to take effect May 15, 1966, but one day before that time the United States withdrew its notice of cancellation as a result of numerous meetings which resulted in an increased limit of liability and was known as the Montreal Agreement. This Agreement between the air carriers, which was signed by TWA and approved by various governmental bodies, including the

[9] Department of State Press Release No. 268, November 15, 1965; See New York Times, November 16, 1965 (City Edition), p. 82, column 1.

United States through its Civil Aeronautics Board,[10] provides:

> "(1) The limit of liability for each passenger for death, wounding or other bodily injuries shall be the sum of U.S. $75,000 . . ."
>
> "(2) The carrier shall not . . . avail itself of any defense under Article 20(1) . . ."

Previously Article 20(1) had provided that a carrier could have a defense that it:

> ". . . ha[d] taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Thus, the Montreal Agreement, as here applicable, waived limitations in the Warsaw Convention and agreed to the increased liability of $75,000 for each passenger, waived the defense it might have under Article 20(1) and accepted absolute liability, provided the transportation was international in scope and involved a location within the United States. (See 32 *Journal of Air Law and Commerce* 243 (1966)). Clearly, the Montreal Agreement imposed liability on carriers for damages caused under circumstances beyond their control such as sabotage and hijacking. *See* 80 *Harvard Law Review* 497, 560 (1967) and *Husserl* v. *Swiss Air Transport Co., Ltd.*, 351 F.Supp. 702 (S.D.N.Y.1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

DISCUSSION

Defendant TWA contends that the Warsaw Convention does not apply for the Plaintiffs here because they were

[10] Approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed.Reg. 7302 (1966).

not injured while "on board the aircraft or in the course of any of the operations of embarking or disembarking", because they were inside the terminal building.

The precise meaning of the terms of any statute or treaty is a question of law. *Todok* v. *Union State Bank*, 281 U.S. 449, 50 S.Ct. 363, 74 L.Ed. 956 (1930); *McDonald* v. *Air Canada*, 439 F.2d 1401 (1st Cir. 1971); *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 392, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974). The scope or substance of the carrier's liability under the treaty must be determined from an examination of the "four corners of the treaty" (*American Trust Company* v. *Smyth*, 247 F.2d 149, 153 (9th Cir. 1957)), keeping in mind the purpose of the contracting parties. *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir. 1957); *Rosman* v. *Trans World Airlines, Inc., supra. Cf. United States* v. *Belmont*, 301 U.S. 324, 331-332, 57 S.Ct. 758, 81 L.Ed. 1134 (1937).

This is further brought out by Article 23 of the Warsaw Convention which states:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

It is not helpful to look at whether or not the airline would have been liable at common law for injuries or accidents occurring under the circumstances here, as contended for by the Plaintiffs. To the contrary, we look to the Convention. As stated by both parties, the Montreal Agreement did not and could not change the terms of the Convention. The latter agreement among several airlines raised the liability limit in accordance with Article 22(1) of the Convention and waived the defense of due care as

provided for in Article 20(1). *Rosman* v. *Trans World Airlines, Inc., supra; McDonald* v. *Air Canada, supra.* Nor was there any attempt by the Montreal Agreement to limit the application of "an accident" as defined in Article 17 of the Convention to exclude the criminal act of a third party. See *Husserl* v. *Swiss Air Transport, supra.*

It is the well established practice of the courts in this country to look to the legislative history of a treaty. *Choctaw Nation* v. *United States,* 318 U.S. 423, 63 S.Ct. 672, 87 L.Ed 877 (1943); *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S.Ct. 191, 78 L.Ed. 315 (1933); *Cook* v. *United States,* 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933). And specifically with respect to the Warsaw Convention, a federal court has stated "the determination in an American court of the meaning of an international convention drawn by continental jurists is hardly possible without considering the conception, parturition, and growth of the convention." *Block* v. *Compagnie Nationale Air France, supra,* 386 F.2d at p. 336.

As we do so, we note that in the working draft that was before the delegates as they met in Warsaw in October of 1929, it was provided:

> "The period of carriage for the application of the provisions of the present chapter, extend from the time when the passengers, goods or baggage enter the airport of departure until the time when they exit from the airport of arrival; it does not cover any carriage whatsoever outside the limits of an airport, other than by aircraft." (Translation from the French; Michael Riffaterre, Professor and Chairman of the Department of French and Romance Philology at Columbia University; Article 20, Paragraph 1 of the Comite International Technique d'Experts Juridiques Aériens).

Apparently, the delegates had little trouble agreeing that liability should attach inside the terminal building in the case of goods and baggage, but there was extensive debate on that principle as regards passengers. *Rosman* v. *Trans World Airlines, Inc., supra.* The New York State Court of Appeals noted that "[t]he minutes of the Convention indicate that the debate over this article [17] centered around the issue of when the air carrier's liability for damage to passengers should begin and end rather than the scope of compensable injuries." *Rosman* v. *Trans World Airlines, Inc.,* 34 N.Y.2d 385, 395 n. 10, 358 N.Y.S.2d 97, 105 n. 10, 314 N.E.2d 848, 854 n. 10 (1974). When the Draft Article was voted upon, it was rejected by the delegates. (Warsaw Minutes at p. 57). The Article was then sent back to the drafting committee and apparently at the suggestion of the French delegate, Mr. Ripert, Draft Article 20 was split into two separate articles; Article 17 for passengers and Article 18 for goods and baggage. (Warsaw Minutes at p. 136).

Article 18, relating to goods and baggage, contained the basic system originally provided for in Draft Article 20; it provided for liability "if the occurrence which caused the damage so sustained took place during the transportation by air." "Transportation by air" was defined as comprising "the period during which the baggage and goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever."

Article 17, as we have seen, related only to passengers and covered the damages, "if the accident which caused the damage so sustained took place on board the aircraft or *in the course of any of the opeartions of embarking or disembarking.*" (Emphasis added).

Amadeo Giannini, the Italian Delegate to the Conference, later wrote, concerning the change in language, that

"in this way, the grave and unjustifiable rule proposed by C.I.T.E.J.A.[11] to have liability commence at the moment of entry into or exit from, respectively, the airport of departure or arrival, is eliminated." (Translation from the Italian; Giannini, *Saggi di Diritto Aeronautico,* p. 233 (1932)).

At the Fifth International Conference on Air Navigation held at The Hague in 1930, D. Goedhuis (later President of The Hague Convention) presented a paper in which he stated:

> ". . . [A]rt. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views *viz:* a) in a broad sense: *i. e.* the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, *i. e.:* the getting on board and the alightment only comprise the actual getting in and out of the aeroplane."

Mr. Goedhuis, during the discussion which followed, stated that he favored "a broad interpretation . . . to cover passengers going from the terminal building to the plane and vice versa." Others, including Dr. W. Muller, President of the Congress Legal Section and the Dutch Delegate to the Warsaw Conference, supported a narrow view which covered the time when the passengers were actually boarding the aircraft. (Fifth Congress, at p. 1173).

From these discussions it is apparent to the Court that the delegates were defining geographical limits rather than

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[11] Comite International Technique d'Experts Juridiques Aériens.

an activity when they used the words, "any operations of embarkation". In any event, even under the broadest of the two positions outlined by Mr. Goedhuis, the Plaintiffs in this case were not within the "operations of embarkation".

We are confronted immediately with Judge Brieant's decision in *Day* v. *Trans World Airlines, Inc.,* 393 F.Supp. 217 (S.D.N.Y. 1975), in an opinion entered March 31, 1975 in which he allowed recovery in suits involving two survivors and one decedent from this same incident who were in the same waiting line to board Flight 881. He very incisively sets forth his interpretation of the "operations of embarkation" as follows (at p. 221):

> "A consideration of the plain meaning of the words 'in the course of any of the operations of embarking' produces a single conclusion. These pasengers could not board the aircraft unless they:
>
> 1. presented their tickets to TWA at the checking desk on the upper level;
> 2. obtained boarding passes from TWA;
> 3. obtained baggage checks from TWA;
> 4. obtained an assigned seat number from TWA;
> 5. passed through passport and currency control imposed by the Greek Government;
> 6. submitted to a search of their persons for explosives and weapons by Greek police;
> 7. submitted their carry-on baggage for similar inspection by Greek police;
> 8. walked through Gate 4 to Olympic's bus;
> 9. boarded the bus;

10. rode in the bus a distance of 100 yards; and

11. walked off the bus and onto the aircraft.

There is simply no other way to 'embark,' except by these eleven steps. None of these pursuits above-named were being conducted for the personal convenience of the passengers, nor did any of them constitute frolic and detour. When they were injured they had completed five out of eleven steps, each absolutely essential. Without any one, a passenger could not 'embark' upon the aircraft.

Of course, when the Convention was drafted, we lived in a simpler day. Many airlines required nothing more than to weigh the passenger and his luggage, take his ticket and allow him to place his foot on the boarding ladder. The plain meaning of the treaty must be adaptable to the practical exigencies of air travel in these parlous times. Regardless of whose real estate he was standing on at the time of the terrorist attack, under the circumstances of this case, any person who had accomplished as many as five out of the above mentioned eleven essential acts without which it would be impossible to travel on the flight, within an uninterrupted time sequence, and was perforce lined up to perform the balance of the required acts sequentially, is within the plain meaning of the clause above quoted. TWA would have refused to carry any passenger until he completed substantially all of the above-enumerated acts in the order listed."

The great difficulty with Judge Brieant's opinion, as this Court views the matter, is that it extends the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the

contemplation of the parties. This, the Court does not feel justified in doing.

The Defendant has cited in support of its position here, the same cases that were cited to Judge Brieant and which Judge Brieant primarily distinguished on the basis that they involved disembarkation. *McDonald* v. *Air Canada, supra; Felismina* v. *Trans World Airlines, Inc.,* 13 Aviation Law Reporter 17-145 (S.D.N.Y.1974); *Klein* v. *KLM Royal Dutch Airlines,* 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974), New York Legal Journal, October 23, 1974 at p. 21, col. 4; *Maché* v. *Air France* [1967] Revue Francaise de Droit Aérien 343, 345 (Cour d'Appel de Rouen 1967); *aff'd* [1970]. It will be noted, however, that many of the steps involved in embarkation, as outlined by Judge Brieant in *Day,* are just as essential, although in reverse, to the steps one must take in disembarking. Thus, it is obvious that in disembarking from the plane, passengers must either come down the steps from the plane or go on the jetway to the terminal building. They may then, as was the situation in the instant case, be required to board a bus, but in any event, they would then enter the terminal building and be subjected to inspection by the government of entry. At this point, we believe, they must be deemed to be beyond the scope of the carrier's liability.

In *McDonald, supra,* a disembarking passenger had left the airplane, left the carrier's area and had arrived in the common terminal baggage area. Subsequently, she was found on the floor, but no testimony was presented to describe the cause of her fall. The First Circuit found the airline was not liable because negligence had not been proven, nor was an "accident" proven, but rather a fall from some internal condition. By way of *dicta,* the Court stated it would seem that a passenger could not recover for events occurring after he "has reached a safe point inside

of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building." (Emphasis added). The Court went on to say, "without determining where the exact line occurs, it had been crossed in the case at bar." (439 F.2d at p. 1405). The rationale of the Court had to do with the operation of disembarking (activity) as being terminated by the time the passenger descended from the plane and reached a safe point inside the terminal, "far removed from the operation of the aircraft"; not just that she had reached the terminal building.

In *Felismina, supra,* plaintiff was disembarking and had walked through an expandable horizontal jetway which led from the airplane door to the "terminal proper", and walked through the long approach ramps at Kennedy Airport into a small room on the upper floor of the terminal. She was injured as she stepped onto the down escalator leading to the lower level of the terminal where health, immigration, baggage claim, and customs were situated. TWA attempted to apply the Convention to that situation because of a shorter statute of limitations. The Court found that the Warsaw Convention did not apply as, "that by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft." It was clear that Felismina was not in the act of disembarking, since she had entered on the down escalator leading to the lower level where the baggage claim and customs were situated. She was well beyond the scope of disembarkation.

In *Klein, supra,* again the plaintiffs had gotten off the aircraft and had arrived safely within the terminal building at Lod Airport, Israel. The Court simply held that they had disembarked "within the meaning of Article 17 of the Warsaw Convention." (*Cf.* McDonald v. Air Canada, *supra.*)

In *Maché, supra,* the plaintiff was led by two stewardesses across the traffic apron from the plane toward the terminal

building. Because of construction work, he had to take a shortcut through the customs garden which was not on the traffic apron proper but off to the side and outside of the terminal building. While crossing the customs garden, which while not part of the traffic apron was on the same level, plaintiff sustained an accident. The Court held that the Warsaw Convention did not apply; as disembarking had been accomplished: "it is only to the extent that these operations are taking place on the traffic apron" that the Convention would apply.

Here as well, we believe, when the passengers were waiting in line to proceed to the last gate of the terminal, they were not within the "operations of embarkation", and that as a matter of law, the Plaintiffs' injuries in the matter *sub judice* were not incurred as a result of an accident actionable under the Warsaw Convention as supplemented by the Montreal Agreement.

The Plaintiffs' Motion for Summary Judgment on the issue of liability is denied; Defendant's Motion for Summary Judgment dismissing the claim is granted.

This Court recognizes that the issue of liability is one of first impression as far as our Circuit and the Supreme Court of the United States are concerned. An immediate appeal from the Order to be entered herein can materially advance the termination of this case and will be granted if so requested.

An appropriate Order will be entered.

In Re Tel Aviv (D. P.R. 1975).

United States District Court, District of Puerto Rico,
December 9, 1975.

[*Statement of case*]

GIGNOUX, District Judge: These three actions seek to recover damages for deaths and personal injuries sustained by arriving international passengers on defendant airline as the result of a terrorist attack in the baggage area of the Terminal Building of Lod International Airport near Tel Aviv, Israel, on May 30, 1972. Plaintiffs claim liability without fault under the provisions of the Warsaw Convention, 49 Stat. 3000 (1934), as modified by the Montreal Agreement, 31 Fed. Reg. 7302 (1966), both reprinted at 49 U.S.C.A. § 1502 note (Supp. 1975.)[1] Defendant has moved for summary judgment on the ground that the Warsaw Convention, as modified by the Montreal Agreement, is inapplicable to these actions, and plaintiffs have filed cross-motions for partial summary judgment on the issue of liability, asserting that the Convention does apply.

[*Facts*]

The material facts are undisputed. Plaintiff in No. 174-73 and plaintiffs' decedents in Nos. 313-73 and 481-73 were members of a large group of Puerto Rico tourists traveling on defendant Air France's Flight No. 132 to Tel Aviv. Flight No. 132 originated in New York, with intermediate stops at Paris and Rome. Three Japanese, in the service of a Palestinian terrorist organization boarded the plane at Rome. On arrival at Lod Airport, the plane came to a halt about one-third to one-half mile from the Terminal Building. The passengers descended movable stairs to the ground and then walked or rode on a bus to the terminal. There, they presented their passports for inspection by Israeli immigration officials and then passed into the

main baggage area of the terminal. While the passengers were awaiting the arrival of the last baggage from the plane, the three Japanese terrorists removed their luggage from the conveyor belt, produced submachine guns and hand grenades, and opened fire upon persons in the baggage area, killing or wounding many, including plaintiff and plaintiffs' decedents. From the time the passengers stepped out onto the movable stairs leading from the plane, all the facilities they used were owned and operated by the State of Israel or El Al, the Israeli National Airline, not by Air France.

[*Warsaw Convention*]

The Warsaw Convention, which was concededly applicable to plaintiffs' flight, provides uniform rules for international air travel. As modified by the Montreal Agreement, the Convention limits the carrier's liability for death or injury to $75,000 per passenger and imposes liability without fault.[2] The scope of the carrier's liability under the Convention is determined by Article 17, which provides:

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or *in the course of any of the operations of* embarking or *disembarking.*" (Italics supplied.)

Defendant concedes that the terrorist attack at Lod Airport was an "accident" within the meaning of Article 17. See *Husserl* v. *Swiss Air Transport Co.* [12 Avi. 17,637], 351 F.Supp. 702, 706-07 (S.D.N.Y. 1972), aff'd mem., 485 F.2d 1240 (2d Cir. 1973). Defendant's contention is that when the attack occurred, the passengers, all of whom had exited from the aircraft and entered the Terminal Building, were no longer "in the course of any of the operations of . . . disembarking," and hence that the Convention

does not apply to plaintiffs' claims. For the reasons to be stated, the Court concludes that the Convention is not applicable to these cases.

[*Disembarking operations*]

The disposition of the motions presently before the Court is clearly controlled by the recent decision of the Court of Appeals for this circuit in *MacDonald* v. *Air Canada* [11 Avi. 18,029], 439 F.2d 1402 (1st Cir. 1971), a case substantially on all fours with the present actions. The plaintiff in *MacDonald,* an arriving international passenger on the defendant airline, suffered a fall while awaiting delivery of her suitcase in the baggage area at Logan International Airport in Boston. She claimed negligence of the airline, or, in the alternative, its liability without fault under the provisions of the Warsaw Convention, as modified by the Montreal Agreement. The Court of Appeals unanimously upheld a directed verdict dismissing her complaint, both upon the ground that she had not proved any negligence and also upon the ground that the provisions of the Warsaw Convention were not applicable to her case. As to the latter ground, the court held, first, that the plaintiff had not shown there was an "accident," within the meaning of Article 17. As an alternative basis for its decision that the Warsaw Convention was not applicable, the court held that plaintiff's fall had not occurred in the course of disembarking operations. In this connection, Chief Judge Aldrich, writing for the court, stated, *id.* at 1405:

"[T]he Convention requires that the accident occur in the course of disembarking operations. If these words are given their ordinary meaning, it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of

whatever mechanical means have been supplied and has reached a safe point inside of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building. Examination of the Convention's original purposes reinforces this view. The most important purpose of the Warsaw Conference was the protection of air carriers from the crushing consequences of a catastrophic accident, a protection thought necessary for the economic health of the then emerging industry. Partially in return for the imposition of recovery limits, and partially out of recognition of the difficuty of establishing the cause of an air transportation accident, the Conference also placed the burden on the cashier [*sic*] of disproving negligence when an accident occurred. II Conference International De Droit Prive Aerien, 4-12 Octobre 1929, at 135-36 (1930); Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934). Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft.* Without determining where the exact line occurs, it had been crossed in the case at bar.

"*Neither does the imposition of liability without fault, as was effected, with respect to United States connected carriage, by the Montreal Agreement. The Agreement, as such, could not change the meaning of Article 17 of the Convention, but we believe its framers assumed the same restricted meaning of that article that we do."

Subsequent to *MacDonald,* at least two other American courts have similarly dismissed Warsaw Convention claims for injuries suffered after the plaintiff passengers had reached the airport terminal building. *Felismina* v. *Trans World Airlines, Inc.,* 13 Av. Cas. 17,145 (S.D.N.Y. 1974) (injury on escalator inside terminal); *Klein* v. *KLM Royal Dutch Airlines,* 46 App. Div. 2d 679, 360 N.Y.S.2d 60

(2d Dep't 1974) (injury on baggage conveyor belt in terminal at Lod International Airport). See also *Mache* v. *CIE Air France,* (1967) Revue Francaise De Droit Aerien 343 (Cour d'appel, Rouen) (injury in fall in airport customs yard). *Cf. Evangelinos* v. *Trans World Airlines* [13 Avi. 18,051], 396 F. Supp. 95, 101-02 (W.D. Pa. 1975) (preflight terrorist attack in terminal). But *cf. Day* v. *Trans World Airlines, Inc.* [13 Avi. 17,647], 393 F.Supp. 217 (S.D.N.Y. 1975) (same).[3]

[*Legislative history*]

Plaintiffs in the instant actions argue that *MacDonald* was incorrectly decided because the court failed to give adequate consideration to the legislative history of the Warsaw Convention, which, they say, was not called to the court's attention. The legislative history, however, makes clear that in drafting Article 17 the delegates to the Convention specifically intended to exclude from coverage accidents occurring to passengers inside an airport terminal building. *Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw* 67-84, 205-06 (R. Horner & D. Legrez transl. 1975) (*"Warsaw Minutes"*).

The Convention was the ultimate product of two conferences, at Paris in 1925 and at Warsaw in 1929. The Paris Conference established an interim committee, the Comite International Technique d'Experts Juridiques Aeriens (CITEJA), to draft a proposed convention for submission to the second conference. Article 20 of this draft defined the scope of the carrier's liability both as to travelers and as to goods and baggage. It made the carriers liable "from the moment when travelers, goods or baggage enter in the aerodrome of departure to the moment when they leave the aerodrome of destination." *Id.* at 264. This provision was challenged as to travelers. *Id.* at 69-75, 78-81. The

Draft Article was rejected by the delegates, *id.* at 82-83, and sent back to the drafting committee, where it was split into two separate articles: Article 17 for passengers and Article 18 for goods and baggage. *Id.* at 205-06. In adopting Article 18, the Conference substantially accepted the CITEJA proposal with respect to goods and baggage, agreeing that liability should attach while "the baggage or goods are in the custody of the carrier, whether in an airport or on board an aircraft. . . ." *Id.* at 206. With respect to travelers, however, the Conference rejected the CITEJA draft in favor of the more limited coverage of Article 17, providing that the carrier is liable for damages sustained in the event of the injury or death of passengers only if the accident that caused the damage took place on board the aircraft or "in the course of any of the operations of embarking or disembarking." *Id.* at 82-84, 205-06.

Whatever uncertainties there may be as to the precise line drawn by Article 17, the above legislative history indicates plainly that the intent of the Warsaw Conference in rejecting the CITEJA draft and in declining to impose in Article 17 the same extent of carrier liability for passengers as that provided by Article 18 for goods and baggage was clearly to exclude liability as to passengers for accidents which occur after the passenger "has reached a safe point inside the terminal," and "which are far removed from the operation of aircraft." *McDonald* v. *Air Canada, supra* at 1405; see *Evangelinos* v. *Trans World Airlines, supra* at 100-01.

Subsequent commentary by Convention delegates and other aviation law writers confirms this view. Thus, Dr. Otto Riese, a German delegate, has written:

"La Convention de Varsovie exclut donc les accidents survenus au cours des operations preliminaires a l'embarquement et posterieures au debarquement, soit notamment pendant la periode du deplacement du passager de

la gare de ville a l'aerodrome, et lors de sa presence dans les locaux de l'aerogare." O. Riese & J. La Cour, *Precis de Droit Aerien* 265 (1951).

See A. Giannini, *Saggi di Diritto Aeronautico,* 233 (1932), and D. Goedhuis, *Minutes, Fifth International Congress on Air Navigation, The Hague, 1930,* at 1173 (both as cited in *Evangelinos* v. *Trans World Airlines, supra* at 101).

[*Conclusion*]

The Court holds that when the Lod Airport terrorist attack occurred, the passengers on defendant's Flight No. 132 had completed their transportation by air and were no longer "in the course of any of the operations of . . . disembarking." The Warsaw Convention and the Montreal Agreement therefore do not apply to the present actions. Accordingly, plaintiffs' motions for partial summary judgment are denied; defendant's motions for summary judgment are granted; and judgment will be entered dismissing plaintiffs' complaints to the extent that they claim jurisdiction or liability without fault under the provisions of the Warsaw Convention, as modified by the Montreal Agreement.

It Is So Ordered.

—*Footnotes*—

[1] Plaintiffs have waived the additional claims asserted in their original complaints under the 1955 Hague Protocol and the 1971 Guatamala Protocol, neither of which has been ratified by the United States. See 1 L. Kreindler, Aviation Accident Law §§ 12.01, 12B.01 (rev.ed. 1971).

[2] The Montreal Agreement is not a treaty. Rather, it takes the form of an agreement among international air carriers, of which

Air France is one, by which the signatory airlines agreed to include in their tariffs to be filed with the Civil Aeronautics Board a "special contract" by which the carrier would waive its limitation of liability under the Convention up to $75,000 per passenger and would concede its liability without fault with respect to flights originating, stopping or terminating in the United States. In return, the United States withdrew a notice of denunciation of the Convention. The Agreement was negotiated in 1966 between the United States Government and the International Air Transport Association, and was approved by the Civil Aeronautics Board. Agreement CAB 18900, approved, CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966), reprinted at 49 U.S.C.A. § 1502 note (Supp. 1975). See also 1 L. Kreindler, *supra,* ch. 12A; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

The Montreal Agreement did not modify in any way the meaning of Article 17 of the Convention, the issue presented by the instant motions. See *MacDonald* v. *Air Canada* [11 Avi. 18,029], 439 F.2d 1402, 1405n. (1st Cir. 1971); *Evangelinos* v. *Trans World Airlines, Inc.* [13 Avi. 18,051], 396 F. Supp. 95, 100 (W.D. Pa. 1975); 1 L. Kriendler, *supra,* § 12A-2.

[3] The District Courts in *Day* and *Evangelinos* divided over whether passengers injured in a terrorist attack at Hellenikon Airport, Athens, Greece, in August 1973 were "in the course of any of the operations of embarking" within the meaning of Article 17. When this attack occurred, plaintiffs were in the transit lounge, just about to board a flight to New York. The *Day* court held they were embarking and hence that the Convention applied; the *Evangelinos* court disagreed and held the Convention not applicable. The *Day* court, however, expressly distinguished the question of disembarkation, 393 F. Supp. at 222-23 (Italics in original):

> "We distinguish readily the case of *Felismina* v. *Trans World Airlines, Inc.,* 13 Av.Cas. 17,145 (S.D.N.Y. June 28, 1974), which involves a claimed disembarking. A passenger who has left the aircraft, unlike plaintiffs is not herded in lines, and has few activities if any, which the air carrier *requires* him to perform at all, or in any specific sequence as a condition of completing his journey. . . ."

Felismina v. T.W.A. (S.D.N.Y. 1974).

DORILLA FELISMINA v. TRANS WORLD AIRLINES, INC.

United States District Court,
Southern District of New York,
June 28, 1974

WARD, District Judge: Defendant Trans World Airlines, Inc. ("TWA") moves for summary judgment pursuant to Rule 56, Fed. R. Civ. P., on the ground that the complaint is time-barred.

Plaintiff was a passenger aboard TWA Flight #901 from Lisbon, Portugal to JFK International Airport, New York. On September 4, 1970, upon arrival at New York, she left the aircraft, walked through an expandable, horizontal jetway which led from the airplane door to the terminal proper, continued across the upper floor of the terminal and boarded a "down escalator" leading to a lower level of the terminal where Health and Immigration, baggage claim, and Customs are situated.

While on the down escalator, plaintiff was allegedly pushed and fell, fracturing her right knee. This action, which was commenced on March 27, 1973, seeks damages resulting from the injury. TWA, relying on Article 29 of the Warsaw Convention, which contains a two-year period of limitations in which to bring suit, moves for summary judgment dismissing the complaint as time-barred.

The question presented is this accident took place in the course of "disembarking" as that term is used in Article 17 of the Warsaw Convention and is therefore covered by the Convention. At oral argument, the parties agreed that this case is one of first impression.

This Court concludes that by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft and that the two-year period of limitations contained in Article 29 of the Warsaw Convention is inapplicable. Accordingly, defendant's motion for summary judgment is denied.

It is so ordered.

APPENDIX D

Maché v. Air France (Court of Appeals of Rouen 1967).

Translation from the French

Maché v. *Air France,* [1967] *Rev. Fr. Droit Aérien* 343 (Appeals Court of Rouen, April 12, 1967), *aff'd,* [1970] *Rev. Fr. Droit Aérien* 311 (Court of Cassation, 1st Civil Chamber, June 3, 1970)

The Court,

Having seen the decision of the Court of Cassation, Civil Chamber, of January 18, 1966, which reversed and annulled the decision rendered on June 29, 1963 by the Appeals Court of Paris, in the instant case for personal injury damages brought by Augustin Maché against the Company Air France, on the basis of Article 1147 of the Civil Code, following the personal injury accident of which he was the victim on March 29, 1958;

Having seen the judgment of the Tribunal of the Seine of June 2, 1961 which decided that the Company Air France was liable for the said accident, but only within the limits provided for in Article 22 of the International Convention of Warsaw of October 12, 1939 [sic] for the unification of certain rules relative to international air transportation and condemned it [Air France] to pay to Maché the value of the sum of 125,000 francs, as such are defined by said Article 22;

Considering that it is settled that on March 29, 1958, Maché took a seat at Orly in a plane of the Company Air France;

That on his descending from the aircraft at the San Bonet Airport, at Palma de Majorca (Spain) Maché and the other passengers were taken in charge by two stewardesses, agents of Air France, to be led to the buildings of the airport where the operations of customs and police were to take place;

That the normal itinerary which ended at the principal entrance of the terminal being impracticable because of construction work, there had been envisaged a replacement itinerary which passed around the "customs area" ["jardin de la douane"] and using a path marked by the letter B of the map drawn up by the Spanish authorities;

That the first agent of Air France who was walking at the head of the group of passengers did not take this replacement itinerary but a short cut crossing the "customs area" (letter A of the same map) where construction work was also in progress;

That the second agent of Air France, the young lady Ginot Belles, as she has moreover declared to the Spanish authorities on March 14, 1958, in the course of a criminal proceeding opened before the permanent military tribunal of Majorca, followed this last itinerary with the second group of passengers among whom could be found Maché;

That this latter one [Maché], in crossing the customs area, put his foot on a metal covered man-hole cover which was in very bad condition;

That under his weight, the man-hole cover rocked, resulting in his fall in a water drain four feet deep containing a casing of tubes and faucets;

That Maché thus suffered serious wounds with open multiple fractures of the tibia and the fibula, fractures of the coccyx which brought about lombar and sciatic pains and difficulties in walking, rendering necessary the intervention of a third person;

Considering that in the debates having resulted in the decision below, Maché claimed, as he does in this appeal, that the accident was without relation to aviation risk, that it was therefore not regulated by the Warsaw Convention, but that it stemmed solely from the common law of land transportation;

That the Company Air France was thus held strictly liable on the basis of Article 1147 of the Civil Code, liability which placed it under a duty to compensate for all the damages sustained by him from the time of his entering Orly Airport where he had embarked until his exit from San Bonet Airport where he had landed;

That a medical investigation had to be ordered to determine the extent of his wounds and that it was decided to grant him provisional compensation of 40 million gold francs by reason of the considerable expenses that he had to incur to be treated;

Considering that according to Maché, the Company Air France replied that the accident having occurred in the course of the operations of disembarking, the Warsaw Convention applied, that it [Air France] claimed that its agents had committed no fault and that it reproached the victim for his inattention;

Considering that the defendant [Air France] reiterates before the Court its pleadings, but raising secondary appeal in what concerns the decision of the judges below; insofar as this [decision] set aside application of the provisions of Articles 20 and 21 of the Convention, requests in addition that Maché be denied recovery;

Considering that, secondly, it [Air France] maintains that its liability is limited to 125,000 francs, by virtue of the general conditions of the contract of carriage to which the Air France ticket used by Maché the day of the accident refers;

That it claims, moreover, that the breaking of the man-hole cover engaged the liability solely of the Spanish Aviation Authority, manager of the airport;

Considering that in law, on application of the Warsaw Convention, that this text [W.C.] provides, in its Article 17, that the carrier is liable for damage . . . when the accident which has caused it has occurred on board the aircraft or in the course of the operations of embarking or disembarking;

Considering that the Convention not specifying what is the meaning of these operations, it is fitting to give it a definition in referring essentially to the basis of the régime of liability established by the Convention;

Considering that it follows from the legislative history that the limitation of liability provided for in this text has for *raison d'être* the particular nature of aviation risk and the impossibility in which air carriers found themselves at the time [of signing the W.C.] to insure their unlimited liability, without practicing excessively high carriage prices which would have driven away their clientele;

That it follows from there, that if the Warsaw Convention regulates, in effect, accidents arising on the ground, in the course of the operations of embarking or of disembarking, it is only to the extent that these operations are taking place on the traffic apron, that is to say at a place of the airport where passengers are exposed to aviation risks;

That the Convention ceases, therefore, to apply when these risks have disappeared, to be replaced by the common law of land transportation which comes back into effect;

Considering in fact that it results, from the information and documents produced, that the accident in this litigation occurred, as it has thus been said, not on the traffic apron of the airport, but inside the customs area, separated from said apron by a continuation of the facade of the buildings of the airport;

That it is settled also that at that moment Maché was guided and directed by the agents of Air France who were leading from the airplane into the buildings of the air port where were to be accomplished the formalities of police and customs;

That he was therefore not free to choose his itinerary, but had to, in this regard, obey the instructions of the agents of the Company Air France.

Considering, therefore, that the accident does not enter into the scope of the Warsaw Convention, but arises out of the common law of land transportation which, by virtue of the presumption of liability set against the carrier, obliges this latter to lead the passenger safe and sound to his destination, and to compensate entirely, should the case arise, for the damages of which he could be the victim to the extent that the contract of passage itself does not exonerate it [the carrier] or does not limit its liability;

[Discussion of exoneration clause in contract of carriage omitted]

Considering that on the respective faults of the parties hereto that the inattention for which Maché is reproached, for the reasons above described, is in no way established, while the imprudence of the agent of Air France who acted against the instructions of the Company, in taking a short cut which she had not previously reconnoitred, is certain, and is in direct relation to the damage suffered by the appellant;

Considering that it is therefore without interest to stop at the question of knowing if he should or not have brought a liability claim against the Spanish Aviation Authority, manager of the airport, because also the latter had planned for, in conjunction with the aviation companies, a replacement itinerary which the stewardess did not follow, and that, moreover, the Company Air France had never been reproached for the bad condition of the man-hole cover;

Considering that definitely, it is fitting to decide that Maché is in a position to take advantage of the provisions of Article 1147 of the Civil Code, with this detail however that it is with good right also that the Company Air France can invoke the clause of limitation of liability provided for in the general conditions of carriage of passengers;

Considering that the amount of the damage sustained by Maché is superior to the sum of 125,000 gold francs; that this fact is not contested by the appellant Company;

Maché v. Air France (Court of Appeals of Rouen 1967).

That it is fitting, therefore, notwithstanding the inexact reasons of the first judges, to affirm the decision below;

For these reasons;

The Court:

Having heard counsel for the plaintiff in their pleadings, Mr. Inselin in his report, counsel for the parties in their oral arguments, Mr. District Attorney having been heard, and after having deliberated in conformity with the law;

Receives in its form both the principal appeal of Maché and the secondary appeal of the Company Air France;

On the substantive issue states that the customs area in which the personal injury accident was sustained by Maché on March 29, 1958, was not exposed to risks of air navigation;

States that consequently the International Convention of Warsaw of October 12, 1929 does not apply to this accident;

States that the Company Air France is liable on the basis of Article 1147 of the Civil Code;

States however that this Company may rightfully take advantage of the limitation of liability provided for in the clauses and conditions regulating the contract of carriage which limits to 125,000 gold francs compensation for bodily injury accidents sustained by passengers;

Affirms, consequently, but for different reasons, the judgment below;

Condemns the Company Air France, having seen its major failure, to all costs of the first action and of the appeal, including the costs incurred before the Court [of Appeals] of Paris, with the exception of the costs of the decision reversed.

President: Mr. Suquet
Counsel: Messrs. Denesle, Pechaud and Garnault

Forsius v. Air France (Tribunal de Grande Instance de Paris 1973).

Translation from the French

Dame Forsius v. *Air France,* [1973] *Revue Française de Droit Aérien* 216 (Tribunal de Grande Instance de Paris 1973)

The Court,

Considering that an order of this court dated May 10, 1967 has ordered a double investigation on a claim directed against Air France by Mrs. Forsius following an accident in which she was the victim on October 10, 1964 at approximately 9:50 A.M., at Orly Airport;

Considering that Pierre Cevallier, expert, has filed his report with the clerk on November 4, 1970 and has expressed the opinion that the floor of the passageway used by Mrs. Forsius was covered with *comblanchien,* a material frequently used for this purpose and which did not present in the area in question and even elsewhere, any characteristic of either abnormality or defect in upkeep which, moreover, the tests conducted have confirmed clearly and show agreement with the impression subjectively felt that *comblanchien* is more slippery than the plastic materials used at other places in the airport; that finally Air France is not responsible for the condition of the floor and for the upkeep of the passage in question, both are incumbent upon the Paris Airport.

Considering moreover that Professor René Michon has filed his report with the clerk on December 19, 1967, that he expressed therein his opinion that Mrs. Forsius suffered a total temporary incapacity of three months, a partial temporary incapacity of 25% of nine months, moderate pain, moderate damage to activities (piano, golf, harpsichord) and a partial permanent incapacity of 17%, all of which resulted from a traumatism of the right wrist with

a fracture of the lower extremity of the radius accompanied by a suspicious picture of a fracture of the lower extremity of the cubitus and resulting in certain subsisting complications;

Considering that Air France requests that Mrs. Forsius' claim be dismissed or be found lacking on the merits because it [Air France] did not at all have responsibility for the condition of the floor and for the upkeep of the passage where Mrs. Forsius claims to have fallen and that it is exonerated either by Article 20, or by Article 21 of the Warsaw Convention;

Considering that for her part Mrs. Forsius claims that Air France is liable to her by virtue of the contract of carriage and should be ordered to pay her various sums amounting to a total of 44,995 francs; that more precisely she requests that the court order and adjudge that the accident was caused by the condition of the floor and the default of Air France in not coming forward with proof of some fault on the part of Mrs. Forsius;

Considering that Mrs. Forsius in the alternative requests a new investigation; considering that by applicaiton of Article 17 of the Warsaw Convention of October 12, 1929 promulgated by decree of December 12, 1932, in that which concerns corporeal damages suffered by passengers, the execution of the contract of air carriage commences only from the time when the operations of embarking are undertaken and it [the execution] ceases at the time when the operations of disembarking have been completed;

Considering that by itself the issuance of travel documents or the checking them does not have the effect of activating the carrier's [contractual] obligations.

Considering that in the instant case Mrs. Forsius who was preparing to embark on a plane of Air France for Tunis slipped on the floor of a passageway restricted to

those having passed through customs ["sous douane"] on the second floor of Orly Airport, that is to say in a place utilized in common by very numerous travelers, passengers on several different air carriers;

Considering that, therefore, the contract of carriage entered into between the plaintiff and Air France was not yet in the course of execution at the time when the accident took place so that Article 1147 of the Civil Code does not apply to the instant case;

Considering that the use of such material for manufacturing floors or their upkeep is a matter which concerns only the Paris Airport which is a "public establishment" instituted by Ordinance 45,2400 of October 24, 1945, Article First, autonomous, and is not in any way the business of Air France against whom liability can no further be looked for on the ground of tort liability;

Considering consequently that Mrs. Forsius' claim must be dismissed;

For these reasons,

Deciding in an adversary proceeding,

Dismisses the claims of Mrs. Forsius' against Air France;

Holds Mrs. Forsius liable for costs.

President: Mr. Thuriet

Counsel: Messrs. Rault and Garnault, Esqs.

Blumenfeld v. BEA (Court of Appeals of Berlin 1961).

Court of Appeals of Berlin (Kammergericht)
Decision of March 11, 1961 — 10 U 61/60
Warsaw Convention — German Law

Statement of Facts

At the suggestion of the German Embassy in Athens the plaintiff took part as a witness in a penal suit pending there in February 1959. The trip from Berlin to Athens was by air, and she booked the entire flight in advance through the Hapag-Lloyd Travel Bureau. For the leg of the flight Berlin-Frankfurt/Main, the plaintiff made use of a craft of the defendant, an airline. She continued the flight from Frankfurt/Main with a craft of the "Swissair" airline. The flight takeoff was to have taken place on February 18, 1959 at 11:15 a.m. according to plan. However, as there was a ground fog at the Berlin Tempelhof airport, the aircraft could not start until about 12:00 Noon. Shortly before 12:00 Noon the door of the waiting room in the airport building was opened to clear the way for the passengers over the traffic apron to the airplane. A stairway leads from the waiting room to the traffic apron: it consists of 20 steps about 2 m. in length and of regular width. The stair is provided with solid railings on both sides. On leaving the waiting room the passengers have to hand over boarding passes which earlier had been distributed to them at the counter of the defendant. As a rule there is a lively crowding, most of the flight passengers being eager to get to the aircraft as soon as possible in order to secure a good seat.

After leaving the waiting room the plaintiff fell on the just mentioned staircase and suffered an injury. She entered the aircraft with injuries to her left tibia and left ankle.

In the present suit the plaintiff claims damages.

Blumenfeld v. *BEA (Court of Appeals of Berlin 1961).*

Opinion

To decide the lawsuit we must start with the fact that the accident took place on the staircase leading from the waiting room of the airport building to the traffic apron.

Insofar as civil air travel is concerned, the Warsaw Convention and the Air Traffic Statute (Luftverkehrsgesetz) are applicable to the air traffic from and to West Berlin with respect to civil law relations (cf. *Schleicher-Reymann-Abraham,* Das Recht der Luftfahrt—The Law of Air Travel—, Volume one, 1960, p. 4, note 7), *i.e.* the Warsaw Convention in the version of October 12, 1929, as published through the notification of November 30, 1933 (RGBl. —Reichsgesetzblatt-German Law Gazette-II, p. 1039). The Hague Protocol of September 28, 1955, amending the Warsaw Convention of October 12, 1929 has so far not come into effect as it has not yet been ratified by thirty contracting states, as provided by its Article XXII. The LVG-Luftverkehrgesetz-Air Travel Statute—is applicable in its revised version of January 10, 1959 (GVoBl. - Law Gazette-Berlin 1959, p. 761 et.seq.), in Berlin, however, only with regard to the BK/O (59) of June 8, 1959 (GVoBl. - Law Gazette-Berlin 1959, p. 728) insofar as certain provisions not of interest here are concerned.

The legal relationship of the parties herein are subject to the Warsaw Convention, i.e. to the extent that contractual and tort liability is in question (cf. *Abraham:* Der Luftbeforderungsvertrag-The Air Transportation Contract —1955, p. 8; *Schleicher-Reymann-Abraham:* op. cit. p. 363). We must start with the fact that the plaintiff booked the entire flight from Berlin to Athens, as evidenced by the flight ticket, through the Hapag-Lloyd Travel Bureau which to this extent has acted as the agent of the air line companies. The flight for which the plaintiff has concluded the transportation contract was an interstate flight within the

meaning of Article 1, par. 3 of the Warsaw Convention (see Abraham, op. cit. p. 11 *et seq.*).

From this, and particularly from Art. 17, 20, 21, of the Warsaw Convention it follows that the defendant, as an air carrier, must make good the damages to the plaintiff caused by an accident on board of an aircraft or during embarkment or disembarkment, unless the defendant succeeds in exonerating itself. Although there is no absolute liability on the part of the defendant, in this respect the burden of proof is passed over to it to its disadvantage (cf. *Rinck* in ZLR 1958, No. 3, p. 298 et seq.).

As brought out earlier, the plaintiff fell down on the staircase leading from the waiting room to the traffic apron. The question arises whether the plaintiff at that time had started "embarking" in the sense of Art. 17 of the Warsaw Convention. This is to be answered in the affirmative. The doubt may indeed arise whether the Warsaw Convention and the corresponding LVG, have regulated the air carrier's liability more strictly merely with respect to the typical hazards directly connected with the use of an aircraft. This, however, would overlook the fact that the air carrier already commits the flight passengers under his care when he requests them to go from the waiting room to the aircraft. Already at that time the air carrier begins to carry out the transportation contract the essential accessory obligation of which consists in providing for the safety of the passengers in every respect and in securing the traffic which was begun. As there exists no absolute liability to the disadvantage of the air carrier according to the law, it cannot be unequitable to interpret the notion of "embarking" in an expansive sense. The opinion represented in the literature is to be adhered to (cf. *Riese,* Luftrecht-Law of the Air- p. 445; *Schleicher-Reymann-Abraham,* op. cit. p. 344; *Abraham,* op. cit. p. 47).

In the present lawsuit, therefore, the liability of the defendant company is established, particularly as it has not succeeded in exonerating itself. It may be that it has to be assumed that an air carrier has exonerated itself as required under Article 20 of the Warsaw Convention when it has proven that it and its agents "have taken all measures reasonably to be expected from a prudent entrepreneur and his prudent crew." This, however, cannot be gathered from the evidence of the witnesses L. and R. unqualifiedly. The plaintiff did not fall down in the presence of these witnesses. The possibility therefore obtains that the unknown-employee who at the time of the accident was on duty on the staircase, did not act with all due care. It is true that the cause of the accident has not been ascertained, but the "non liquet" here works to the disadvanage of the defendant who bears the burden of proof. It is true and not contested by the parties herein that the staircase on which the accident occurred was in proper condition. But in case of a not established cause of accident this very circumstance cannot result in a justification of an assumption of the plaintiff's own negligence through application of the principles of prima facie evidence. (cf. BGH—Bundesgerichtshof—Federal Supreme Court of Germany—in 1956 NJW—Neue Juristische Wochenschrift —New Law Weekly—pages 709, 710). It must first of all be assumed that the plaintiff, experienced in travel as she was, was capable of using the staircase without accidents unless she was prevented from doing so due to an event occurring from the outside.

The kind of indemnification, not regulated by the Warsaw Convention but left to the legislation of the individual states, follows from § 1 of the Law executing the Warsaw Convention of December 15, 1933 (RGB1.—German Legal Gazette—I p. 1079). It is determined for cases under Adticle 17 of the Warsaw Convention according to §§ 21, 22

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and 24—§§ 35, 36, 38 of the revised text of the LVG. Accordingly, *i.e.* under § 36 LVG, the indemnification that the plaintiff can demand comprises the medical costs as well as the detriment to her property that she has thereby suffered in that her requirements, temporarily or permanently, have increased due to the injury. (There follow statements as to the extent of the damage).

The plaintiff also demands the payment of damages for "pain and suffering" of an amount of DM 2,000.00. To this extent, however, the suit is not justified. The already cited §§ 35, 36, 38 LVG do not contemplate the payment for pain and suffering. Only Art. 25 of the Warsaw Convention leads to § 847 BGB—Burgerlinches Gestzebuch—German Civil Code—over § 1 of the already cited Law of December 15, 1933. According to this last provision, however, the defendant would be liable only if the plaintiff had been able to prove that the defendant had caused the accident intentionally or at least grossly negligently. The plaintiff overlooks that Art. 25 of the Warsaw Convention in contrast to Article 17 of the Warsaw Convention, places the burden of proof on the injured party (cf. *Schleicher-Raymann-Abraham,* op. cit. p. 365). However, the plaintiff did not bring the proof demanded of her. She has been unable to name any witnesses who had seen the accident. The cause of the accident has remained unclear. It cannot be established that the defendant acted with gross negligence.

APPENDIX E

WARSAW CONVENTION MINUTES

SECOND INTERNATIONAL CONFERENCE on PRIVATE AERONAUTICAL LAW

October 4–12, 1929
Warsaw

MINUTES

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FOURTH SESSION
October 7th, Morning

The session is open at 10 o'clock, Mr. Lutostanski presiding.

THE PRESIDENT: Sirs, the session is open.

The order of the day for our discussion involves the question of the scope of liability. (Heading II).

On this question we have first of all under letter (a), German, Italian, British, Brazilian, Hungarian, Swiss and Soviet amendments - definition of the period of carriage. (Article 20, paragraph 1).

I give the floor to the Reporter.

MR. DE VOS, Reporter: I must point out, first of all, that a German amendment has been indicated on this question by mistake.

Moreover, I point out that the Swiss Delegation has retracted its amendment; I am particularly pleased by this, and I would like that this example be followed as much as possible.

As regards the amendments which remain, the most important is that of the British Delegation which consists, in principle, in providing for forced landing.

Moreover, the British Delegation has deemed that it would be better to define the period of carriage, not by the indication "end and beginning of this carriage" but defining the period of carriage itself.

The proposal of the USSR, as well as that of Brazil consists, especially for goods, in making the beginning of the period of carriage the moment where the goods have been actually received by the carrier or delivered by the consignor to the forwarder.

I suggest to you to take first of all the British proposal, which is the most important. If it were accepted, it would permit us to satisfy the Hungarian Delegation at the same time.

SIR ALFRED DENNIS (Great Britain): We have proposed an amendment for Article 20 which seems to us to be one of mere wording, but the question is so important that the preparatory committee considered it as a question of substance as regards the scope of application of the Convention.

Article 20, such as it is presently drafted, in its first paragraph provides:

> The period of carriage, for the application of the provisions of the present chapter, shall extend from the moment when travelers, goods or baggage enter in the aerodrome of departure, up to the moment when

> they leave the aerodrome of destination; it shall not include any carriage whatsoever outside the limits of the aerodrome otherwise than by aircraft.

In our opinion, this does not include all the situations which the Convention wants to cover; this text envisages simply the case of a trip from an aerodrome of departure to an aerodrome of arrival, as from Croyden to Le Bourget, but there are other cases. For example, there is the case of combined carriage by railroad, by sea and by air, which becomes more and more frequent. We have provided in the first article that these combined carriages could exist, since, in the last paragraph of this first article, we say:

> In the case of combined carriage, performed in part by air and in part by any other means of carriage, the provisions of the Convention shall apply only to those portions of the carriage performed by air if they meet the conditions of paragraph 2.

Now, when there is combined carriage which begins by rail, which continues by air, then by rail and again perhaps by air and by sea, the expressions "the aerodrome of departure and the aerodrome of destination" are perhaps no longer appropriate.

Moreover, there is the case of transshipment, of a layover during carriage. I have in mind a traveler, who, in the course of transfer, has a stop of two hours; he profits therefrom to go do some shopping in town. Is he still under the ambit of the Convention? Naturally not.

It's for this reason, that, in the first part of our amendment, we propose to stipulate that the scope of application of the Convention be limited uniquely by the nature of the carriage that one wishes to include, and we give the following wording:

> The period of air carriage, for the application of the present Convention, shall include all periods of time, during which passengers, goods, or baggage are, during the performance of international carriage, on board an aircraft or within the limits of an aerodrome, under the restriction that in case of landing outside an aerodrome, the period of air carriage shall be deemed interrupted as regards passengers, only from the moment when the latter leaves the immediate proximity of the landing, and, as regards goods and baggage, only from the moment when their carriage by means other

than aircraft is resumed.

The period of air carriage shall be deemed to include no means of carriage outside the limits of an aerodrome, other than by the airways.

In the first part of this amendment we retain the principle that the Convention shall apply within the limits of the aerodrome, and it's upon this principle that we propose this amendment. Certain delegates would have preferred that the Convention be applied only after boarding the aircraft, but this principle was rejected by the CITEJA. The CITEJA decided that presence within an aerodrome confers upon passengers or goods the application of the Convention. According to this principle, we have drafted our amendment.

The second part of our amendment refers above all to the question of forced landing outside the limits of an aerodrome. In this case, naturally, if the aircraft breaks up upon landing, there will be no question presented, but if the aircraft lands without breaking up, the question will be raised of knowing if the passengers who disembark and who wait in a field near the aircraft, or goods which are unloaded in the field, are still under the regime of the Convention. It's a question which was not provided for in Article 20, such as it is drafted, and this is why we have proposed the last part of the amendment that I have just read.

MR. GIANNINI (Italy): Mr. President, Sirs, we speak here of an amendment proposed by the Italian Delegation; in reality, it is not a question of an amendment but of a suggestion to improve the formula presented by the CITEJA.

As regards the substance of the problem, I believe that it's a question above all of considering certain suggestions in practical order which are developed in other amendments.

We believe that one can take these proposals into consideration and my colleague will perhaps, himself, explain.

But, I would like to make a practical proposal: I believe that we can come to an agreement on the principle posed by the British Delegation. We should thus leave to the drafting committee the duty of finding a better formula, because I believe that our colleagues from Great Britain are the first to think that this better formula can be found.

As regards the other formulae, the formula of the Soviet Union and that of Brazil, I believe that if these Delegations would fall in with the general will, it will be easy to agree, but it is necessary that we come to agreement on interpretation; for the rest, it's a question for the drafting committee.

MR. DE VOS, Reporter: The British Delegation has revealed very clearly the meaning of its proposal. I think that this proposal, as Mr. Giannini said, becomes a question of simple wording. In effect, this proposal is made quite within the spirit of the text proposed by the CITEJA.

It is not because the period of carriage will be defined in leaving aside the notion of the beginning and of the end that there will be something changed. The only addition is that which specifies the case of forced landing, and the case of unbroken travel. There was no difficulty on this point of view within the CITEJA, and we were in agreement in understanding the solution of the CITEJA in the sense proposed by the British Delegation.

I suggest therefore, that we refer this text to the drafting committee.

The proposal of the USSR and of Brazil is quite different and brings up again the principle which we discussed before.

MR. AMBROSINI (Italy): Mr. President, Sirs, I take the floor as a member of the conference and also as Reporter of the Third Committee of the CITEJA.

It's a question here of knowing what the system under which passengers will find themselves who enter in an aerodrome is.

There can be different situations - the passenger who enters in an aerodrome can be injured or killed by an aircraft of the airline which was to carry him; on the other hand, he can be killed or wounded by an aircraft belonging to any other carrier and which is at that moment present in the aerodrome. Now, Article 20 says that the period of liability applies from the moment when the passenger is within the aerodrome.

I wonder if one must allow for the second case above mentioned, the liability such as it is instituted by the Convention, that is to say, subjective and unlimited liability, or rather if one must apply the principle of risk which was adopted by the Third Committee, that is to say, liability vis-a-vis third parties for damages caused even within the limits of an aerodrome.

I wonder again if the passenger or his estate will have the right to bring two suits: one vis-a-vis the company with which he had contracted, and the other vis-a-vis the third party who caused the injury or the death.

In sum, it is necessary, in my opinion, to have expressly in mind the case of a passenger killed or wounded by a third party in an aerodrome, because this case is not provided for in the present text.

I will add that should the conference adopt the proposal of the Delegation from Brazil, things will become much easier,

because, according to this proposal, the system of liability of the Convention applies only when the passenger is on board the aircraft.

MR. PECANHA (Brazil): Mr. President, Sirs, it's not a question, according to our amendment, of reducing the liability of the carrier, nor of mitigating it. It's a question merely of applying to the period of liability in air law rules identical to those which are applied as regards contracts of carriage. The law in all countries as regards carriage, is subject to precise rules, as regards the beginning and the end of liability.

I remind you, you know as well as I, that according to the commercial interpretations of several countries, the contract of carriage is only perfected when the employees of the enterprise have taken possession of the goods to be shipped.

It's an occasional transfer of possession which must be effective and open, rather than symbolic.

Article 20 establishes that the period of carriage runs from the moment when the passenger, goods, or baggage enter the aerodrome of departure, up to the moment when they leave the aerodrome of destination.

Now, aerodromes and airports as we know, are not always served by a single air carrier, something which renders Article 20 less precise.

Can one make the carrier liable for the life of the passenger before he has boarded the aircraft?

How many accidents can occur within the boundaries of the aerodrome before the departure takes place?

Can one make the carrier liable for the preservation of goods by the simple fact of their entry in the closed space of the aerofrome?

In railroad legislation, one allows the entry of the goods into the station and the shipping of these goods in return for the receipt which is given to the forwarder; but the present day aerodrome is not under the same conditions which will govern perhaps one day, the aerodrome of the future. The Italian Delegate clearly emphasized this point.

Here is the reason for which the Brazilian Delegation proposes the following amendment: to replace "from the moment when travelers, goods and baggage enter the aerodrome of departure up to the moment when they leave the aerodrome of destination" by "from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder".

MR. DE SZENT ISTVANY (Hungary): Mr. President, Sirs, the Hungarian Delegation proposed the following amendment con-

cerning the period of carriage: Complete the first sentence of the article by the following addition - "up to the moment when they leave the aerodrome of destination or when they leave the aircraft in case of landing en route".

The Hungarian Delegation, in making its proposal, wanted the definition of the period of carriage to provide for the case of forced landing. Given that the formula presented by the British Delegation seems on this point of view to be satisfactory to the Hungarian Delegation, I think that I must indicate that the Hungarian Delegation allies itself with the British proposal.

MR. SABANIN (USSR): Mr. President, Sirs, after the words which have just been delivered by the Delegate from Brazil, the Delegation from the USSR has not much to say. Our proposals are absolutely in accord.

I would simply like to say one thing that seems to me important on the subject of the trends which took shape yesterday during the course of our work. One of these tended, without any doubt, to a softening and to a limitation of the liability of the carrier. Under these conditions, it seems logical that the liability of the carrier within the limits of the aerodrome be mitigated. Let us suppose an aerodrome like that of Koenigsberg which is very well placed, but where several air carriers have their planes. If a passenger is injured in the aerodrome before entering the aircraft, for example, while he is in the restaurant of the aerodrome, it does not seem logical, if one keeps account of the trends which took shape and to which I referred a moment ago, to say that the carrier would be liable. I admit that the proposal of the Delegation from Brazil is more explicit and better drawn than ours. Consequently, I declare that I withdraw our proposal to ally myself with that of Brazil.

MR. RIPERT (France): Sirs, if I listen to my personal feelings, I would perhaps simply propose to the conference the complete elimination of Article 20. This article projects us into a series of difficulties which we will not avoid.

In any case, I think that it is absolutely necessary to reshape it. One wanted, in the same formula, to provide at the same time for the carriage of goods and the carriage of travelers; now the two questions are absolutely distinct.

If there is carriage of goods, the contract is formed as soon as the air carrier has received the goods, and he is responsible therefore, up to the moment when he has delivered them. If he does not perform the air carriage, if he ships by another means of carriage, his liability cannot disappear by the fact that there exists a contract.

Thus, for goods, one can consider that from the moment

when they are received by the carrier up to the moment of their delivery, the contract applies. Suppose that after having been delivered to the air carrier, the goods are damaged during the period of transport from the hanger of the company to the airport: The Convention will apply all the same and the air carrier will benefit from the rules on the limitation of his liability.

There is real difficulty only for travelers, and this difficulty arises from the fact that the traveler has his independence and that, when he has not yet embarked on the aircraft, or when the aircraft has made a stop, he leaves the aircraft, he is no longer within the performance of the contract of carriage.

What can we do? There are an infinite variety of cases; we will never succeed in putting them in the same formula; it is sufficient to say that the air carrier is liable for damages and accidents sustained during the course of carriage.

The British Delegation has recognized so much of the difficulty in the question that it proposes to refer the definition of what is meant by aerodrome to local rules; this can be an open space in flat country, the bridge of a ship, etc....

As the Delegate from Brazil said, it is a little absurd to say that an air carrier will be liable before the traveler is on board the aircraft, when this traveler is on the bridge of a ship, or when he takes a walk on an airport!

I will propose to you to separate Article 20, in providing in a distinct manner for the liability of the carrier of goods. For goods, the question is very simple and can be easily resolved. Next, one will look to the liability for the carriage of travelers, and here one would be content to employ a general formula - "during air carriage" - in leaving to the courts the duty of deciding in each case if one is within the contract of carriage.

I believe that we will never arrive at finding a formula indicating when the contract of carriage begins and ends.

MR. PITTARD (Switzerland): The Swiss Delegation had submitted an amendment, and I advised our sympathetic Reporter that we withdrawing it provisionally without renouncing, however, the right to submit it.

What Mr. Ripert has just said corresponds so much to reality that I do not hesitate, in the name of the Swiss Delegation, to join with the formula that he has presented and to withdraw our amendment definitively.

MR. GIANNINI (Italy): Following the discussion, I believe that one ought to ally oneself with a question of principle which was raised by the Delegation from Brazil. Certain rules which were proposed by the British Delegation can perhaps be retained as well, but, I believe that, very rightly, Mr. Ripert has raised

the question, welcomed with much sympathy by the Italian Delegation, of separating as much as possible the carriage of goods from the carriage of travelers.

In this order of things - to discriminate as much as possible between the two subjects of the Convention - I would like to propose that we examine in drafting committee the possibility of making two distinct articles or of separating the article in two parts: one for travelers, and the other for goods.

For goods, one could adopt the principle that when goods enter under the direct responsibility of the carrier, that is to say that when he takes possession of the goods, up to the moment of the delivery, the liability of this carrier is engaged.

As regards travelers it is necessary to ally oneself with the proposal of the Delegation from Brazil and to leave out of the text the moment when the traveler boards, as long as there will not be a special Convention, the application of the Convention being thus regulated by the common law of each country.

MR. PECANHA (Brazil): I would like to add one word only.

The French Delegate proposes that the liability begin when the carriage takes place - during the carriage. Now, in the case law of rail accidents, or accidents in maritime navigation, it is always a question of the accident's occuring when the train or when the ship has not departed.

MR. RIPERT (France): We are in agreement.

MR. PECANHA (Brazil): When does the carriage take place? The flying boat is on the apron; it has not yet taken off and the traveler is inside, has the carriage commenced?

MR. RIPERT (France): Yes.

MR. PECANHA (Brazil): In Italian case law one recognizes as the beginning of carriage the act of embarkation, before the take-off. According to the expression employed by the Delegate from France, take-off is not necessary. Now, in French air case law, it is often a question of take-off, and it is precisely that which determined me to employ this expression, "take possession of the goods", the expression which is found in French jurisprudence.

French civil lawyers have already raised this question: In France must we consider that the contract of carriage of goods is a symbolic or real transfer of possession? It's in taking account of the Italian criteria, of the Italian legal tradition and case law, that I came up with the formula that I propose, which had been studied in both countries, but I am irreversibly committed to no proposal. I recognize highly the capacity of each delegate and I pay tribute to the prior work of Mr. Ripert and Mr. Ambrosini.

I am of a mind, like Mr. Giannini, to make a new wording of

Article 20, but I remind you that there is therein a question of form and at the same time a question of substance.

MR. VIVENT (France): I would like to say a word on this question which is above all, one of practical order.

In all countries the operation of the airport is distinct from the operation of the lines. Either it is the State which operates the port, or - in Germany this is true for a long time, and in France we have more and more a tendency to do it - it is private organizations which are charged with the operation of the airport. So, here and now, we acquire the habit of separating clearly the two operations, and this separation imposes itself from the fact that it is not the same organisms which operate them. To do so, more and more, is to separate clearly the administration of the airport from the operation of the air lines.

Consequently, all damage which can result from accidents happening prior to the beginning of carriage, during the distance which passengers can cover in the airport, is the responsibility of the administration of the airport.

SIR ALFRED DENNIS (Great Britain): The observations of Mr. Ripert puzzle us a little because they are not written down, and I would like to have a written proposal.

There are two observations that I would like to make on the subject of the proposal of the Delegate from Brazil.

Mr. Pecanha proposes that the application of the Convention begin, as regards goods, from the moment when they are delivered into the hands of the carrier. But, we have always seen the difficulties which can arise from this proposal. For example, when the goods are delivered in the center of London, they are transported by truck to the aerodrome. This is an example, but there are others. The goods are thus in the hands of the carrier before being in the aerodrome. Let us imagine a truck which transports goods from London to Croyden; if it's a question of an ordinary truck, along the route it is subject to national laws; if the truck belongs to the air carrier it is going to be subject to the Convention. Then, you will have two systems of liability, because it is well stipulated in that any transport other than air carriage is placed under the regime of the common law.

As regards the carriage of goods, the IATA discussed the question long ago and these gentlemen have changed their point of view. First of all, if my memory is good, they had spoken in the sense of the proposal of the Delegate from Brazil: The liability of the carrier begins when the goods are on board. But, after having consulted, they changed their opinion, and the members of the IATA, who are, in reality, the interested parties, believed that it would be better that the Convention begin to come

into play as soon as the goods enter into the aerodrome. Consequently, the parties especially interested, that is to say, the carriers, are favorable to the principle adopted by the CITEJA.

I don't think that we should linger on the question of damage sustained on the ground, because if damage is caused on the ground in an aerodrome by the aircraft of the carrier, we are within the ambit of the Convention; but if the damage is caused by the aircraft of another company, the carrier is not liable by the terms of the Convention, considering that he offers proof that he is not at fault.

MR. AMBROSINI (Italy): I must call the attention of the conference to an eventual consequence of the modification of Article 20.

We are going to divide Article 20 into two parts, the first aiming at goods, the second aiming at travelers; we are going to specify the moment when the system of liability provided for by the Convention shall apply. But then, it seems to me that it is necessary to change as well, the wording of Article 21.

In effect, Article 21 said: "The carrier shall be liable for damage sustained during carriage...".

Now, if we determine in Article 20 the moment when liability begins to be applied, it seems to me that it is useless to add in Article 21: "for damage sustained during carriage". I propose simply to say: "the carrier shall be liable for damage".

I must call the attention of the conference to another question.

Article 21 provides for the situation of:

(a) death, injury and any other bodily injury suffered by a traveler;

(b) destruction, loss, or damage to goods or baggage;

(c) delay in the carriage of travelers, goods or baggage.

But, the case of non-performance is not provided for. For example, goods are delivered to the carrier: They are within the aerodrome, the aircraft did not leave, the contract is not performed. Must one say that the carrier is liable or not? Without doubt, he is, but it must be so said in the Convention, but Article 21 says nothing.

In my opinion, since it is necessary to provide for the case of total non-performance of the contract, it is necessary to add to letter (c): "in case of non-performance of the contract, or of delay".

In this case it should be necessary as well to improve the formula of Article 28, which aims at the period within which the liability action must be brought.

MR. RIPERT (France): If you have total non-performance,

there is no interest in having an international convention; the consignor is in his country, he has all the resources of common law. How and why do you want to apply here limited liability and its consequences?

MR. AMBROSINI (Italy): I simply raise the question which seems doubtful to me, and I believe that it is better to say that in the case of the non-performance of the contract the Convention does not apply. I point out that this case is not involved in the Convention.

MR. DE VOS, Reporter: I don't want to cause my friends any trouble, however light, but truly you place me in a very difficult position. This discussion reminds me of my good recollections of Paris, of Brussels, where we discussed the same thing thoroughly for hours, and the conclusion of it was the declaration made by Sir Alfred Dennis.

Why, when from the beginning we had taken the same formula as that presented by the Delegate from Brazil and by the Delegate from the USSR, have we abandoned it? For a question of fact, for difficulties in practice.

In theory, the ideas contained in the proposals of Brazil and the USSR are excellent, and they denote a profound study of the problem. It's so true that, from the beginning, almost all the delegates had suggested the same formula. But the practical difficulties begin when it becomes necessary to draw up the text, taking into account the two principles.

As regards passengers, it is easy to say that the liability begins when the passenger has embarked. Does this suffice? There is the case of the aircraft which is still in the hanger, which is on the traffic apron, which is taxiing etc.... These are all the difficulties which suggested a single solution which is the same for passengers and for goods; because, even for goods, the difficulty is not resolved in saying that "the goods are received by the carrier". Outside the aerodrome often enough they are carried by a truck, perhaps by railroad. How do you want the consignor to establish at what moment the liability of the air carrier commenced? He does not even know when the goods are taken over by the carrier!

It's in the face of these difficulties that we have adopted a unique solution, establishing what? Not a definitive system of liability, but simply a presumption; that is to say that when there is liability of the carrier, it can exist only during the period of carriage which we presumed existed at such time.

The dangers which were pointed out are illusory. Article 22 establishes a very mitigated system of liability for the carrier, and from the moment that the carrier has taken the reasonable

measures, he does not answer for the risks, nor for the accidents occuring to people by the fault of third parties, nor for accidents occuring for any other cause.

I insist that we abbreviate the debates, that you not put the drafting committee in an inextriable situation, and that you adopt the basic idea of Article 20, in taking into account the excellent observations of the Italian Delegation and the Delegation from Brazil, and of the British Delegation such as they were formulated.

MR. RIPERT (France): Sirs, I insist that this article be referred to the drafting committee: under its present form, it is incomprehensible and unable to be applied.

One tells us, as regards the carriage of goods: Goods will sometimes be carried by trucks to the aerodrome. It's a situation which we know well. When one performs carriage by railroad, it often happens that the railroad takes care of the trucking; one has nevertheless made a contract of carriage. When the air carrier has received the goods, the contract begins; it ceases when he has delivered them.

For passengers, the formula of Article 21 is certainly inexact for specific cases. Take liability in case of delay: For liability in case of delay, it is of little importance if the traveler has penetrated the aerodrome or not; if one says to him: The flight that you were to take is not leaving, the liability is engaged.

There remains only the question of injury and death. I say that it is practically impossible to find in the Convention a precise text indicating at what moment the passenger finds himself to have already commenced the contract of carriage. If he puts his foot on the step of the stairway which leads to the interior of the aircraft, for example, the contract of carriage has commenced. It's a question of fact which the courts will have to resolve, and they are accustomed to resolving them.

Why do you want, as regards air carriage, to have very precise formulae that don't exist in any other mode of carriage and which indicate when such carriage commences? The courts will decide if the carriage had commenced when the accident occured.

In my opinion, Article 20 must be modified. We propose therefore to refer it to the drafting committee in order that this committee try to find a new formula creating a distinction between goods and travelers. This formula would be submitted to the conference which could deliberate thereon.

MR. CLARKE (Great Britain): Starting from which principle?

MR. RIPERT (France): For goods, the contract is concluded

upon the receipt of the goods by the air carrier; for travelers - and envisaging simply the case of death or injury of the traveler - these cases of death or injury are submitted to the system instituted by the Convention from the moment where the contract of carriage begins to be performed.

MR. YOUPIS (Greece): Since we have a drafting committee I must note that there exists a difference between the two texts which we have before our eyes. First of all, if we take the text of the draft of the Convention as printed, it says: "the period of carriage, for the application of the provisions of the present chapter...".

While in the green brochure where I found the records of the debates, it is said: "the period of carriage within the meaning of the present Convention...".

I draw the attention of the drafting committee to this difference of texts.

As regards Mr. Ambrosini's observation for the new wording of Article 21: "the carrier shall be liable for damage sustained", I believe that one can take up this idea in saying: "the carrier shall be liable for damage arising during the period of carriage", that is to say, to employ the same terms as for Article 20, if the drafting committee stays with this text.

THE PRESIDENT: Does someone ask the floor on this chapter?

MR. DE VOS, Reporter: I am in agreement in referring the question to the drafting committee but there should be no misunderstanding.

I don't believe that one can refer the text to the drafting committee following the proposal of Mr. Ripert. I have the very strong impression that there are several delegations who are absolutely opposed to the distinction which is proposed and, personally remembering no better than anyone, but as well as anyone, all the prior discussions, I could not accept it.

I see that all the difficulties that I pointed out remain, and I even wonder if Mr. Ripert has himself considered that other difficulties of substance, even for goods, exist. In sum, his proposal consists in what? It consists in having the air carrier subject to the system for all carriage, no matter what it is: bus, truck, etc., while we wish to see it established solely for air carriage.

MR. RIPERT (France): In addition to air carriage, it's the system which exists for rail transportation.

MR. DE VOS, Reporter: It is not possible that this same air carrier, for the same goods, for the same contract of carriage, accepts three different systems of liability.

MR. RIPERT (France): But it's you who applies to it several different systems! Me, I always apply to him the same one!

I ask the conference to pass on this point: Shouldn't Article 20 be drawn up establishing a distinction between travelers and goods?

You have, in the first paragraph, a formula which cannot be applied: "the period, etc...shall extend from the moment when the travelers, goods or baggage enter the aerodrome...".

Goods don't enter if they are not carried!

According to Article 20, the air carriers take the traveler in charge from the moment when he enters the aerodrome of departure up to the moment when he leaves the aerodrome of destination. So that if you take, for example, the trip of the Graf Zeppelin, the air carrier would have had charge of the travelers, who, profiting from the stopover in San Francisco, would have gone to take a walk in town and would have been there victims of an accident! It's impossible.

I will ask you, Mr. President, to put to a vote the question of knowing if a new text should not be made clearly distinguishing between travelers and goods.

MR. RICHTER (Germany): I believe that the drafting committee should submit two wordings, one based on the British proposal and the other on Mr. Ripert's proposal. I believe that we are not yet ready to decide a question of substance, because we have not seen the formula of the French Delegation.

MR. DE VOS, Reporter: This is the observation that I was going to make. The conference should first decide if it can examine a proposal which has not been written down, upon which it is necessary to pass without having a draft. It's a new proposal of which we have had no knowledge. I had thought it was a question of wording, but it's a very important question of substance.

I ask the Assembly if it is possible for it to take a position on this question?

SIR ALFRED DENNIS (Great Britain): It seems to me that here there are questions of principle upon which one can pass before the referral to the drafting committee.

For example, as regards travelers, does liability begin, as it is said in the draft, upon the entrance into the aerodrome of departure, or does it begin when the traveler is on board the aircraft? Here is the divergence as it exists as regards the travelers: When must liability begin? Following the principle established in the draft of the Convention, or simply when the traveler is on board?

It's a question upon which I ask that one pass before the

referral to the drafting committee.

As regards goods, the divergences are the following. There is a proposal contained in the draft of the Convention by the terms of which the application of the Convention begins right from the entrance of the goods in the aerodrome; ther there is the Brazilian proposal which wants liability to begin when the goods are delivered into the hands of the carrier.

There again, it seems to me that there are two different and divergent principles, and I propose that we make a decision. I ask therefore that these diverse proposals be put to a vote first of all for travelers, and then for goods. These are questions of principle.

MR. DE VOS, Reporter: We should make a decision first of all on the carriage of travelers and then on the carriage of goods. The situation, in effect, can be different.

In the carriage of travelers, there is a double solution possible: either maintaining the text which would consist in engaging the liability of the carrier as soon as the passenger enters the aerodrome, or accepting the suggestion which was made which consists in saying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft.

I point out again that this last solution, practically, is not one at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped on the step-up of the aircraft, the step-up which is not an actual part of the aircraft, and be injured by another aircraft.

Be that as it may, the proposal is very clear.

As regards goods, it's a question of knowing if the conference wishes to engage the liability of the carrier, either by the entry of the goods in the aerodrome or by the taking into custody thereof by the air carrier.

THE PRESIDENT: No one asking the floor anymore, if you permit, we are going to pass to a vote without taking into account the wording. It's a question of passing simply on the question of substance.

First of all, we have the question of carriage of travelers. We have a first proposal which establishes liability of the air carrier upon the entry of the traveler in the aerodrome. I am going to put this principle to a vote.

MR. RIPERT (France): Excuse me, Mr. President! There is an amendment which requires referral to the drafting committee for the drafting of a new text. It's on this amendment that we should vote first of all. We ask referral to the drafting committee for the drafting of a new text.

MR. DE VOS, Reporter: Based on what?

MR. RIPERT (France): On the distinction to be established between travelers and goods.

MR. ARENDT (Luxembourg): It seems indispensible to me to indicate first of all to the drafting committee the directives which it will have to follow to prepare its text; if not, the drafting committee will work in a void, it will perform a work which will be admitted or rejected. So that, before deciding to refer to the drafting committee, it is indispensible to vote in the sense of the proposals made by the British Delegation, which discriminated very well between the various cases. When the conference will have made a decision on these points which will be submitted to a vote, then the drafting committee will be able to work in a useful manner.

MR. PECANHA (Brazil): I take into account the observations presented by the British Delegation, the French Delegation, and by the Reporter on the subject of carriage of goods. That means that as soon as the goods enter the aerodrome, liability begins immediately. Thus, for this part, from my point of view, the concession is complete.

But for the question of carriage of travelers, outside the penal question, for the case of death or injury, I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft.

MR. DE VOS, Reporter: I point out simply to the Delegate from Brazil that the great inconvenience that he sees in the present text was provided for, and that, in Article 22, were put the terms: "the carrier shall not be liable if he proves that he and his servants have taken reasonable measures to avoid the damage, or that it was impossible for them to take them...".

MR. PECANHA (Brazil): That's secondary; it's the burden of proof. We must take into account the preceeding work and the text of the report.

MR. DE VOS, Reporter: The significance of my observation is simply to say that after Article 20 there is Article 22, and that we must read them together.

THE PRESIDENT: Sirs, we are going to pass to a vote on the principle of liability regarding carriage of passengers.

I put to a vote the text of the draft of the Convention. The vote is asked by States.

SIR ALFRED DENNIS (Great Britain): I allow myself to note that I have the right to three votes, representing Great Britain, Australia, and the Union of South Africa.

THE PRESIDENT: That's correct. The vote is open.

(Result of vote: FOR - 11 votes, AGAINST - 14 votes. STATES VOTING FOR: Germany, Austria, Belgium, Denmark, Great Britain, Union of South Africa, Australia, Hungary, Norway, Netherlands, Czechoslovakia.
STATES VOTING AGAINST: Brazil, Egypt, Spain, Estonia, France, Greece, Italy, Japan, Luxembourg, Mexico, Poland, Switzerland, USSR, Yugoslavia.)

THE PRESIDENT: We are now going to vote on the other proposal concerning the carriage of passengers that we have not decided. It's a question of saying that the liability of the carrier begins at the moment when the passenger embarks on the aircraft. Now, I don't know if perhaps we shouldn't consider the rejection of the text proposed by the draft of the Convention as the acceptance of the other proposal?

MR. GIANNINI (Italy): I understood, for my part that if one voted against the text of the draft of the Convention, that meant that one accepted the other proposal, that is to say, referral to the drafting committee. (General agreement).

THE PRESIDENT: There is not opposition to this point of view?...Then, it is thus so decided. We refer to the drafting committee.

We pass now to a vote on the principle of liability as regards the question of goods.

We have a first proposal...Mr. Pecanha, Brazil.

MR. PECANHA, (Brazil): Mr. President, I withdraw my amendment and I declare myself in agreement with the British Delegation as regards goods.

THE PRESIDENT: I note it for the record, but all the same we must vote on this question of goods.

There are two proposals, the first consists in declaring that liability of the carrier begins upon the entrance of the goods in the aerodrome, the second that liability begins as soon as the goods to be transported are taken into custody by the carrier.

A vote by states was demanded. Balloting is open.

(Result of vote: For liability upon the entry of the goods in the aerodrome - 14 votes; For liability after the taking into custody - 10 votes. ABSTENTION - 1.
STATES VOTING FOR "upon entrance": Germany, Austria, Belgium, Denmark, Spain, Estonia, Great Britain, Union of South Africa, Australia, Greece, Hungary, Luxembourg, Norway, Czechoclovakia.
STATES VOTING FOR "after the taking into custody": Egypt, France, Italy, Japan, Mexico, Netherlands, Poland, Switzerland,

USSR, Yugoslavia. ABSTENTION: Brazil.)

THE PRESIDENT: I ascertain that the Assembly has come out in favor of the system of liability beginning upon the entrance of goods in the aerodrome. The text is referred to the drafting committee.

MR. SABANIN (USSR): I ask what the situation is regarding carriage of passengers? We have voted on a principle aimed at Article 20, that is to say, we have rejected the present text. We voted next, for goods a principle of liability beginning upon the entry of the goods in the aerodrome, but for passengers, what is the situation?

THE PRESIDENT: We have said that the rejection of the present Article led to the acceptance of the opposite principle.

MR. AMBROSINI (Italy): The modification of Article 20 leads necessarily to a modification of Article 21.

THE PRESIDENT: We refer this question to the drafting committee. We pass now to the French amendment which proposes to prepare a new article for special carriage, letter (b). The Reporter has the floor.

MR. DE VOS, Reporter: The proposal of the French Delegation consists in adding a new article to the draft of the Convention. Its goal is to provide for special carriage, notably when an aircraft is placed on a new line, a line which is created for experimental purposes, for example.

It is evident that the first aircraft which are placed on those lines can carry, not only mail, but also goods, and perhaps even passengers. It is quite logical that, since these carriages are not normal, one make an exception in their favor. It's the same thing for carriage performed under exceptional circumstances: An aircraft of a regular line is obligated to land en route; a second aircraft is sent by the carrier to take the passengers and goods in breakdown. This carriage cannot be done under normal conditions, and it is fair enough that the system of liability not necessarily apply to these cases.

The Reporter can see no disadvantage in this addition.

MR. RIPERT (France): I thank the Reporter for his adherence to the text which we have proposed. I add that this text can be amended with respect to wording. We don't stick at all to wording.

We present here the question of providing by a text for these special carriages, to which the Convention is inapplicable. The Convention provides for the delivery of documents before departure and a whole series of provisions which could not be observed.

and shall attach to the air waybill such documents as, before the delivery of the goods to the consignee, are necessary to meet the formalities of customs, octroi, or police. The consignor shall be liable to the carrier for all damage which could result from the absence, insufficiency, or irregularity of any such information and documents, except in the case of fault on the part of the carrier or of his servants.

2) The carrier shall not be required to inquire into the correctness or sufficiency of sufficiency of such information or documents.

THE PRESIDENT: Does someone ask the floor on this article?...I put Article 15 to a vote.

(Adopted).

We pass to the following article.

CHAPTER III
Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in case of death, of wounding, or of any other bodily injury suffered by a traveler when the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking and disembarking.

MR. GIANNINI, President of the Committee: I draw the attention of the conference to this article and to those which we are going to read, the three articles of the Chapter, for the following reason:

As our colleagues certainly recall, these are perhaps the most important articles of the Convention. There were many amendments proposed and under these conditions the drafting committee envisaged the possibility of retaining the system of the CITEJA preliminary draft, that is to say that of beginning by Article 21: when begins and when ends the liability of the carrier. But, given that there are entirely different liability cases: death or wounding, disappearance of goods, delay, we have deemed that it would be better to begin by setting out the causes of liability for persons, then for goods and baggage, and finally liability in the case of delay.

This turns out to mean that the subject treated in the articles about which I spoke to you awhile ago is taken up again, but following the order that I have just indicated to you. The totality of the questions to consider is divided up in three articles. You will find therefore that which appeared in Articles 20 and 21 divided in three articles.

- I add right away that we are still in the same situation; it's not a question of new articles but of a new numbering of the articles.

THE PRESIDENT: No one asks the floor?...I put Article 17 to a vote.

(Adopted).

We pass to the following article, Article 18.

Article 18

1) The carrier shall be liable for damage sustained in the event of destruction of, loss of, or damage to, checked baggage or goods when the event which caused the damage occured during air carriage.

2) Air carriage, within the meaning of the preceeding paragraph, shall include the period during which the baggage or goods are found in the custody of the carrier, whether in an airport or on board an aircraft or in any place whatsoever in the case of landing outside an airport.

3) The period of air carriage shall not extend to any carriage by land, by sea, or by river, performed outside an aerodrome. However, when such carriage is performed during the execution of the contract of air carriage for the purpose of loading, delivery, or transshipment, any damage shall be presumed, subject to contrary proof, to have resulted from an event having taken place during the air carriage.

SIR ALFRED DENNIS (Great Britain): Sometimes aerodrome has been used and sometime airport. One should put "aerodrome" throughout.

MR. GIANNINI, President of the Committee: Understood. The correction will be made.

THE PRESIDENT: No one asks the floor?...I put Article 18 to a vote.

(Adopted).

We pass to the following article.

APPENDIX F

TRANSIT LOUNGE FLOOR PLAN

[For convenience of Court and Counsel this document is bound in on the opposite page.]

SCALE 1:200

BAR

DUTY FREE SHOPS

GATE 4

GATE 6

TRANSFER DESK

ARRIVALS

SIDEWALK

(CONCRETE AND LAID)

P O O L (SOUTH)

RAMP

FENCE

SOUTH PIER

IDENTICAL TO SOUTH POOL AREA

TRANSIT LOUNGE

SCALE 1:200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1354

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

ARISTEDES A. DAY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals appears at pages 3-18 of the separate Appendix ("App."), at 13 Avi. 18, 144, and is officially reported at 528 F.2d 31. The opinion of the District Court appears at App. 21-32 and is officially reported at 393 F.Supp. 218.

Questions Presented

1. Where passengers had handed their airplane tickets to employees of the defendant (TWA), had received boarding passes with seat selections on them and baggage checks for their luggage, passed through passport control, proceeded to the transit lounge for international passengers to which they were restricted, and were attacked by Arab

terrorists while they were in line waiting to board the aircraft at a gate to which they were directed by a boarding announcement made by TWA, did the Court below err when it held that the passengers were "in the course of any of the operations of embarking" under Article 17 of the Warsaw Convention?

2. Did the Court below err in concluding that the plain meaning, legislative history, and the underlying purpose of the Warsaw Convention required a determination that TWA must be held liable?

Statement

Respondents[1] seek recovery for personal injuries and wrongful death resulting from an attack by unknown Arab terrorists at the Athens Airport, Athens, Greece, on August 5, 1973 (R 16).[2]

Prior to August 5, 1973, respondents purchased tickets on TWA's Flight 881, which provided for air transportation from Athens to New York City (R 97, 105a). The aircraft was scheduled to depart Athens Airport at 3:30 P.M. (R 98).

Prior to the scheduled departure time, respondents presented their tickets and luggage to TWA's ticket agent on the upper level of the airport (R 98). The agent removed the tickets from an envelope, and kept the ticket coupons (R 98). He then gave respondents boarding passes with seat selections on them and baggage checks for their luggage (R 98).

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[1] All passengers followed essentially the same embarking procedures and they all were similarly situated at the time of injury. For the sake of clarity, however, the facts pertaining to the Kersen passengers will be utilized.

[2] References preceded by "R" refer to pages of the Record contained in the Appendix submitted to the Second Circuit.

Thereafter, TWA's ticket agent directed the respondents to passport control, which was also on the upper level of the airport (R 98). After their passports were stamped, the respondents proceeded to the transit lounge on field level, where they were required to remain until they boarded the aircraft (R 98, 99). The transit lounge, which was reserved exclusively for departing international passengers, was level with the airport runways and the apron where the plane was parked to receive the passengers (R 98). While they were waiting in the transit lounge, TWA announced and directed passengers for Flight 881 to proceed to Gate 4 to be searched and board the aircraft (R 98, 99).

To board the plane, the respondents were to be personally searched and then were to proceed through the door of the transit lounge for a distance of approximately 100 yards to the aircraft (R 99). At approximately 3:15 P.M., while the respondents were at Gate 4, standing in line to be searched, and just prior to walking out onto the field, several unknown Arab terrorists attacked persons in the waiting room including the respondents with rifles, machine guns and hand grenades (R 99). Prior to said attack, approximately seven passengers were screened and had passed through Gate 4 (R 110). As a result of the attack, Mr. Kersen was killed and all of the respondents sustained personal injuries (R 60, 99).

The Warsaw Convention

The Warsaw Convention applies to "all international transportation of persons [passengers], baggage or goods performed by aircraft for hire." Article 1(1). It is undisputed that the contract of transportation made between the instant passengers and TWA, as set forth in the tickets issued by TWA, provided for "international transportation."

The liability of the carrier under the Warsaw Convention is specifically imposed by Article 17:

> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger. . . ."

Warsaw's Article 22 limited damages to a maximum of $8,300 per passenger.

The Montreal Agreement

Many years after this country's adherence to Warsaw (1934), and due to intense dissatisfaction with the inadequate $8,300 damage limitation, the United States formerly denounced the Warsaw Treaty on November 15, 1965, with the cancellation to take effect six months later. As a result of numerous meetings of air carriers and governments, and in order to induce the United States to withdraw its denunciation of the Warsaw Treaty, the Montreal Agreement[3] was created.

Under the Montreal Agreement, TWA waived the $8,300 limitation contained in Warsaw's Article 22 and agreed to pay up to $75,000 to each injured or deceased passenger. TWA also waived any defense it might have under Article 20(1) of Warsaw (that the carrier took all necessary measures to avoid the damage or that it was impossible to take such measures). Accordingly, TWA is absolutely liable in the instant cases for damages not to exceed $75,000 per passenger, irrespective of whether or not TWA was negligent or at fault, if the passengers were injured or killed "in the course of any of the operations of embarking . . ." under Article 17 of the Convention.

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[3] CAB 18,900, Order E-23680, May 13, 1966.

Proceedings Below

Respondents moved for summary judgment with respect to each claim that alleged TWA's absolute liability up to the sum of $75,000 based on Article 17 of the Warsaw Convention as supplemented by the Montreal Agreement. Respondents' motions contended that, as a matter of law, the passengers were injured in the course of embarking operations. TWA cross-moved for summary judgment.

By a memorandum decision dated March 31, 1975 (App. 21-32), the District Court granted respondents' motions for partial summary judgment on the issue of liability and denied TWA's cross-motion for summary judgment.

The District Court certified an interlocutory appeal under 28 U.S.C. § 1292. Permission to appeal was granted by the Second Circuit Court of Appeals on May 9, 1975. The decision of the District Court was affirmed by the Second Circuit on December 22, 1975 (App. 3-18).

REASONS FOR DENYING THE WRIT

1. The Decision Below is Correct.

Respondents submit that the Court below was correct in concluding that the plain meaning of Article 17 and the underlying purpose of the Warsaw Convention dictated finding TWA liable. In so holding, Chief Judge Kaufman rejected TWA's assertion that no terminal building accidents were covered by the phrase "in the course of any of the operations of embarking."

> "We are of the view that the words 'in the course of any of the operations of embarking' do not exclude events transpiring within a terminal building. Nor, do these words set forth any strictures on location.

Rather, the drafters of the Convention looked to whether the passenger's *actions* were a part of the operation or process of embarkation, as did Judge Brieant. [Emphasis by the Court.]

"It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the 'operations of embarking' commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were 'in the course of embarking.'" (App. 8, 9.)

Based on selected quotations from the Warsaw Minutes, TWA asserts that the drafters "accepted" (TWA's Petition, page 14) a Brazilian proposal to have the liability of the carrier begin when the passenger embarks on the aircraft, rather than the proposal of CITEJA[4] which would have made the carrier liable as soon as the traveler entered into the aerodrome of departure. No fair-minded reader of the Warsaw Minutes could come to this conclusion. Based upon its reading of the Warsaw Minutes, the Second Circuit stated the following:

[4] Comité Internationale Technique d'Experts Juridique Aériens, the committee of experts appointed to prepare a draft convention for consideration by the Warsaw delegates.

"Prof. Georges Ripert, the French delegate, however, forcefully argued against both the CITEJA and the Brazilian proposals. It was, he observed, virtually impossible to draft a precise formula that would satisfactorily cover the myriad of cases that could arise. Prof. Ripert proposed that the article be recast in terms broad enough to allow the Courts to take into account the facts of each case. See Warsaw Minutes at 49-50, 53-54 [said pages correspond to App. Pages 79-81, 85-87]. The delegates voted to reject the CITEJA draft and to accept the French suggestion. *Id.* at 57 [which corresponds to App. 90]. The drafting committee then rewrote the CITEJA proposal in the form now set forth in Article 17.

"The Minutes of the Warsaw proceedings thus undermine TWA's contention that the delegates wished to implement a rigid rule based solely on location of the accident. Rather, we believe they preferred to provide latitude for the Courts to consider the factual setting of each case by considering the elements we have referred to above."[5] (App. 11-12).

In sum, the Second Circuit did not pay "lip service" (page 7 of TWA's Petition) to its duty, but thoroughly considered and analyzed the language of Article 17, its legislative history and the underlying purposes of the Warsaw Convention in concluding that the instant passengers were "in the course of embarking."

[5] The Second Circuit was here referring to a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction), and location.

2. The Decision Below Does Not Conflict With the Decision of Any Circuit Court of Appeal.

The decision below is not "substantially in conflict" (TWA's Petition, page 8) with *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971). In *MacDonald*, an elderly passenger fell after she had disembarked and while she was in the baggage claim area. *MacDonald* held that she had not proved an "accident," as required by Article 17. The Court then stated, in *dicta*, that it would seem that a passenger could recover against the airline under Article 17 for events occurring up to reaching a safe point inside the terminal. The Court specifically indicated that it was not setting forth a general rule concerning when liability commenced under Article 17:

> "Without determining where the exact line occurs, it has been crossed in the case at bar." 439 F.2d at 1405.[6]

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[6] Judge Gignoux considered *In Re Tel Aviv*, 13 Avi. 18,166 (D.P.R. 1975), to be substantially on all fours with *MacDonald* and, therefore, controlled by said decision. *Klein* v. *KLM Royal Dutch Airlines*, 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974), was also a disembarking case in which the plaintiff sustained injury in the baggage claim area of the airport. In *Felismina* v. *Trans World Airlines, Inc.*, 13 Avi. 17,145 (S.D.N.Y. 1974), the District Court simply concluded that "by the time plaintiff boarded the down escalator she had disembarked from defendant's aircraft."

Cf. *Mache* v. *Air France* (App. 59-64), a disembarking case which states, in *dicta*, that Article 17 only applies to operations on the traffic apron, with *Blumenfeld* v. *BEA*, 11 ZLW 78 (Berlin Court of Appeals 1962), which held that Article 17 covered a passenger who fell down a staircase leading from the terminal to the traffic apron because

> "the air carrier commits the flight passengers under his care when he requests them to go from the waiting room to the aircraft. Already at that time the air carrier begins to carry out the transportation contract the essential accessory obligation of which consists in providing for the safety of the passengers in every respect and in securing the traffic which was begun." App. 70.

Chief Judge Kaufman considered *MacDonald* to be:

> "clearly distinguishable. . . . Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation." (App. 9.)

CONCLUSION

For the foregoing reasons, TWA's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

MELVIN I. FRIEDMAN, an attorney for the respondent Kersen and a member of the Bar of this Court, certifies that on April 14, 1976, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served by mail upon all parties required to be served as follows:

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Dated: April 14, 1976

MELVIN I. FRIEDMAN.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1354

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

ARISTEDES A. DAY, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This Supplemental Brief is respectfully submitted in opposition to defendant Trans World Airlines, Inc.'s (TWA) Petition for Certiorari. Its purpose is to bring to the Court's attention a recent decision of the Third Circuit Court of Appeals in *Evangelinos* v. *Trans World Airlines, Inc.*, which was rendered on May 4, 1976. A copy of the *Evangelinos* opinion and Judgment is annexed hereto as Appendix A and Appendix B, respectively.

POINT I

The decision below does not conflict with the decision of any Circuit Court of Appeal.

One of the cases relied on by TWA in its Petition was *Evangelinos* v. *Trans World Airlines, Inc.*, 396 F.Supp. 95 (W.D. Pa. 1975). Said decision was correctly characterized by TWA as "indistinguishably in conflict" with the subject decision by the Second Circuit Court as it arose out

of the same accident and involved the same legal issue. It was the evident hope of TWA that the Third Circuit Court of Appeals would affirm the trial court's decision in *Evangelinos,* thereby creating a true conflict between Circuit Courts.

The Third Circuit has, however, reversed the trial court. See Appendix A. The decision by the Second Circuit in *Day* v. *Trans World Airlines, Inc.,* 528 F.2d 31 (2d Cir. 1975), which TWA seeks to have reviewed, and the decision of the Third Circuit in *Evangelinos,* are in complete harmony.

MacDonald v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971), relied on by TWA as being "substantially in conflict" with the Second Circuit's *Day* decision, was considered to be "clearly distinguishable" (528 F.2d at 34) by Chief Judge Kaufman. The Third Circuit has now found that *MacDonald* is not

> "inconsistent with the conclusion that 'the operations of embarking' had commenced at the time of the accident in this case" (App. 7a).

Conclusion

For the foregoing reason, and for the reasons stated in Respondents' Brief in Opposition, TWA's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix A, Opinion, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1990

CONSTANTINE EVANGELINOS, CALLIOPPI EVANGELINOS, ERMA EVANGELINOS, STELLA EVANGELINOS and MARY JULIA EVANGELINOS,
Appellants

v.

TRANS WORLD AIRLINES, INCORPORATED

(D. C. Civil No. 74-165)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1976

Before SEITZ, Chief Judge, and VAN DUSEN and WEIS, Circuit Judges

Donald L. Very, Esq., Tucker, Arensberg & Ferguson, Pittsburgh, Pa.,
Attorneys for Appellants

Michael L. Magulick, Esq. & Robert E. Wayman, Esq., Wayman, Irvin, Trushel & McAuley, Pittsburgh, Pa.,
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OPINION OF THE COURT
(Filed MAY 4, 1976)

VAN DUSEN, Circuit Judge.

On August 5, 1973, the Transit Lounge of the Hellinkon Airport in Athens, Greece, was the scene of a vicious terrorist attack on the passengers of TWA's New York bound Flight 881.

Appendix A.

The principal question presented by this interlocutory appeal[1] concerns the liability of Trans World Airlines under the terms of the Warsaw Convention, 49 Stat. 3000, et seq. (1934), as modified by the Montreal Agreement of 1966, 31 Fed. Reg. 7302 (1966).[2] The district court concluded that the terms of the Convention were not applicable to the plaintiffs at the time of the terrorist attack and accordingly granted TWA's motion for partial summary judgment, dismissing the claim under the Warsaw Convention.[3] Evangelinos v. Trans World Airlines, 396 F. Supp. 95 (W. D. Pa. 1975). We reverse and remand.

The facts of the attack on which this litigation is based have been exhaustively summarized elsewhere[4] and need not be repeated here. It is enough to state briefly that, at the time of the terrorist attack, plaintiffs had already completed all the steps necessary to boarding the aircraft except (1) undergoing physical and handbag searches,[5] and (2) physically pro-

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1. By amended order dated June 26, 1975, the district court certified this appeal pursuant to 28 U. S. C. § 1292(b) (232-33a). On July 21, 1975, we granted plaintiff-appellants' petition for permission to appeal. Jurisdiction is based on 28 U. S. C. §§ 1331 and 1332. Plaintiffs are citizens of Ohio. Defendant is incorporated in the State of Delaware and has its principal place of business in New York.

2. Both the Convention, a treaty officially entitled "A Convention for the Unification of Certain Rules Relating To International Transportation by Air," and the Montreal Agreement are reprinted at 49 U. S. C. § 1502 note (1970).

3. The complaint alleged both absolute liability under the Warsaw Convention, as modified, and negligence.

4. Evangelinos v. Trans World Airlines, Inc., supra at 96-98, and Day v. Trans World Airlines, 528 F. 2d 31 (2d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3546 (U. S., Mar. 30, 1976).

5. These searches were required and conducted by the Greek Government and were prerequisites of being permitted to leave the airport by plane. TWA had two guards stationed inside the terminal building immediately beyond the search procedure area.

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ceeding from the search area to the aircraft some 250 meters away. Immediately after Flight 881 was announced over the Transit Lounge loudspeaker, the passengers were instructed to form two lines in front of Departure Gate 4. And, while all but a handful were standing in those lines awaiting the search procedure,[6] two Palestinian terrorists fired bursts of auto-

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6. The district court stated that:

". . . entrance to [the Transit Lounge] is restricted to passengers ticketed and scheduled to depart on international flights of the . . . carriers operating out of the terminal and to other personnel, who are not passengers, needed to service the area. . . . At . . . Gate [4], there are two separate lines, one for males and one for females, where there is a handbag search and a physical search made by the Greek Police. There are tables for examination of hand luggage and behind the tables were located two booths for physical search of all persons intending to depart. After the search, passengers would proceed through double doors out of the Transit Lounge where they boarded buses for transportation to the aircraft stationed at some distance from Gate 4.

". . . Two TWA Security Guards were stationed at Gate 4 as well as at least two passenger service personnel of TWA. After being physically searched, the passengers would have walked to two sets of exit doors which led from the Transit Lounge to a raised terrace attached to the terminal building. Two sets of stairs were located on the east side of the terrace leading to a waiting area where there was a bus . . . intended to carry persons across the traffic apron a distance of approximately 250 meters to where the airplanes were parked for loading.

"At the time of the attack, all eighty-nine passengers scheduled to board TWA Flight 881 had checked in and received their boarding passes. The Plaintiffs had completed the various steps required and began to queue up in two lines preparatory to proceeding through the hand baggage and physical searches. . . .

"Approximately seven Flight 881 passengers had departed through Gate 4, exited the Transit Lounge, and had either boarded or were about to board the bus previously referred to. The great majority of the eighty-nine scheduled passengers

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matic weapons fire in the general direction of the TWA queues and hurled hand grenades, which exploded in the vicinity.

Under the terms of the Warsaw Convention, as modified, TWA is absolutely liable to a limit of $75,000. per passenger if an incident which causes passenger injury falls within the ambit of Article 17 of the Convention.[7] Article 17 provides:

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6. (continued)
for Flight 881 were in line in front of the tables at Gate 4 at the time of the incident. The Plaintiffs were injured while being queued up in line in front of Gate 4 while waiting to be searched."
Pages 97-98 of 396 F. Supp. (footnotes omitted).

7. As originally conceived and drafted, the Convention effected a bargain in which airline passengers traded a monetary limitation on damages -- the equivalent of $8,300. per passenger -- for the establishment of a rebuttable presumption of liability on the part of the carrier for "accidents" falling within the ambit of the Convention. Warsaw Convention, Chap. III. American dissatisfaction with this bargain, especially the limits on damages, ultimately led to the Montreal Agreement, a voluntary agreement between air carriers governing international transportation that involved a United States location. Pursuant to the Agreement, each participating airline filed with the Civil Aeronautics Board a contract under which the damages limit was raised to $75,000. and the various carriers agreed not to assert any of the affirmative defenses provided in Article 20 of the Convention. The effect was contractual creation of a new regime of absolute liability for damages arising from incidents falling within the Convention. For excellent discussions of the background of the Warsaw Convention and the Montreal Agreement, see Block v. Compagnie Nationale Air France, 386 F. 2d 323 (5th Cir. 1967), cert. denied, 392 U. S. 905 (1968); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

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> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis added.)

TWA does not dispute the district court's conclusion that a terrorist attack on airline passengers is an "accident" within the meaning of Article 17. Thus the central question is whether the terrorist attack took place "in the course of any of the operations of embarking . . . ."

Our task has been significantly facilitated by the Second Circuit's recent decision in Day v. Trans World Airlines, 528 F. 2d 31 (2d Cir. 1975), petition for cert. filed, 44 U. S. L. W. 3546 (U. S., Mar. 30, 1976), an identical case arising out of the same incident. See also Leppo v. Trans World Airlines, Inc., ___ Misc. 2d ___ (N. Y. Sup. Ct. No. 21770-1973, Trial Term Part 62, Decision of Mar. 10, 1976, N. Y. County). In the Day case, Chief Judge Kaufman, in a thorough and scholarly opinion, carefully analyzed the history and purposes of the Warsaw Convention, as modified. Emphasizing the American experience under the Convention, the current expectation of air carriers governed by the Convention as modified, and the considerations militating in favor of liability in this case, the Day court unanimously concluded that the activities of the TWA passengers in this case fell within the purview of the phrase "the operations of embarking." We agree with the result reached in Day and note that there is a substantial interest in uniformity of decision in this area. Cf. Block v. Compagnie Nationale Air France, 386 F. 2d 323, 337 (5th Cir. 1967), cert. denied, 392 U. S. 905 (1968).

Giving the phrase "in the course of any of the operations of embarking" a common sense construction, we agree at

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the outset with plaintiffs' contention that we must examine the nature of the activity in which plaintiffs were engaged to determine if that activity can fairly be considered part of "the operations of embarking." Nothing in the Convention defines the term "operations of embarking" or otherwise delimits the period of liability prior to actual boarding. Nevertheless, for substantially the same reasons expressed in Day v. Trans World Airlines, supra, 528 F. 2d at 33-34, we believe it is appropriate under all the facts and circumstances of this case to view the activity of undergoing pre-boarding searches as part of the "operations of embarking."[8]

The undisputed facts reveal that, at the time of the attack, the plaintiffs had completed virtually all the activities required as a prerequisite to boarding and were standing in line at the departure gate ready to proceed to the aircraft. The plaintiffs' injuries were sustained while they were acting at the explicit direction of TWA and while they were performing the final act required as a prerequisite to boarding busses employed by TWA to take the Evangelinos family to the aircraft. More significantly, at the time these operations had commenced, Flight 881 had already been called for final boarding. As a result, TWA passengers were no longer mingling over a broad area with passengers of other airlines. Instead, acting pursuant to instructions, they were congregated in a specific geographical area designated by TWA and were identifiable as a group associated with TWA's Flight 881.

By announcing the flight, forming the group and directing the passengers as a group to stand near the departure

8. Among the relevant factors are activity, control and location. We emphasize the activity in which plaintiffs were involved, the control by defendant of the plaintiffs at the time of the accident, and the relation of the terrorist attack causing the accident to air travel.

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gate, TWA had assumed control over the group. This conclusion is supported by the fact that TWA service personnel were standing at Gate 4, guiding the passengers, and TWA security personnel were present. Under these circumstances, it is reasonable to conclude that TWA had begun to perform its obligation as air carrier under the contract of carriage and that TWA, by announcing the flight and taking control of the passengers as a group, had assumed responsibility for the plaintiffs' protection. Thus, for all practical purposes, "the operations of embarking" had begun.

Neither MacDonald v. Air Canada, 439 F. 2d 1402 (1st Cir. 1971), nor the French case of Maché v. Air France, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), aff'd Rev. Fr. Droit Arien 311 (Cour de Cassation 1970) (reprinted in translation as Exhibit B to appellee's brief), is inconsistent with the conclusion that "the operations of embarking" had commenced at the time of the accident in this case. First, both cases involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which plaintiff was engaged differed significantly from the case at bar.[9] Further, both the MacDonald and Maché

9. See also In Re Tel Aviv (D.P.R. Dec. 9, 1975) (Nos. 518-72 et al.). In MacDonald, the plaintiff was injured while she was waiting for her baggage in the baggage claim area of Boston International Airport. She was in no sense under the control of the airline or acting as a part of a group under direct airline supervision. In Maché, the plaintiff was injured while walking from the aircraft. He was following an Air France stewardess and it is not completely clear whether his route varied from hers, since the manhole cover did not "rock" causing her to fall. Also we note that the plaintiff in Maché was arguing against the applicability of the Warsaw Convention and that the court in MacDonald held that the plaintiff's injuries in that case were not caused by an "accident" within the meaning of Article 17.

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courts considered the Convention's original goal of developing rules to govern the risks then thought to be inherent in air carriage and concluded, on that basis, that the Convention did not apply because the plaintiffs had reached "safe" points, distant from such risks. MacDonald v. Air Canada, supra at 1405; Maché v. Air France, supra. See also, Sullivan, The Codification of Air Carrier Liability by International Convention, 7 Journal of Air Law 1, 20 (1936). Since the danger of violence -- whether in the form of terrorism, hijacking or sabotage -- is today so closely associated with air transportation, we have little difficulty in concluding that the plaintiffs in this case were not located in a "safe place," far removed from risks now inherent in air transportation. We note that another terrorist attack on airline passengers recently occurred in Israel. See In re Tel Aviv, supra at note 9. To conclude otherwise would be to freeze the Warsaw Convention in its 1929 mold, when air travel was in its infancy, and to ignore current air travel procedures and the special risks created by the type of violence that resulted in this tragedy.

Nor are we convinced by TWA's principal argument that "the operations of embarking" can never occur within the physical confines of an air terminal building and that the Warsaw Convention is, therefore, inapplicable. Starting, as we must, with the actual language used in Article 17, we are struck by the fact that nothing in Article 17 suggests a limitation on the period of liability based strictly on the location of the "operations of embarking or disembarking." To the contrary, the contrast between the phrase "while on board the aircraft" and the phrase "in the course of any of the operations of embarking . . ." indicates that the draftsmen of Article 17 made a

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conscious choice to go beyond a mere location test. Further, adoption of the strict location test advanced by TWA could lead to differing results resting solely on the fortuity of where passengers are placed at the time of injury. In the absence of plain language compelling such a conclusion, we reject it.

Recognizing that nothing on the face of Article 17 supports their argument, TWA directs our attention to the treaty making history of that Article. The pertinent history consists of debates centered around Article 20 of the draft Convention prepared by a small committee of experts, Comité Internationale Technique d'Experts Juridique Aeriens (CITEJA), for consideration at Warsaw. Article 20 of the CITEJA draft provided in part:

> "The period of carriage, for the application of the provisions of the present chapter [Liability of the Carrier] shall extend from the moment when the travellers . . . enter the aerodrome of departure, up to the moment when they leave the aerodrome of destination . . . ."

When the draft Article 20 came up for consideration, it provoked considerable debate between those who endorsed the expansive aerodrome-to-aerodrome period of liability and those who espoused a more restrictive view. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, 67-84 (R. Horner & D. Legrez transl. 1975) (hereinafter Minutes). Ultimately the principle of aerodrome-to-aerodrome liability was put to a vote and defeated. Minutes at 82-83. The problem of drafting a new article in conformity with the vote was then referred to a drafting committee and Article 17 in its present form emerged.

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TWA contends that the rejection of the CITEJA draft demonstrates that the delegates intended to exclude from the period of liability the time during which passengers are inside air terminal buildings. We disagree. While the rejection of the CITEJA draft indisputably reflected an intent to restrict the expansive period of liability envisioned by Article 20, nothing in the debates indicates that the line was finally and unalterably drawn at the walls of airline terminal buildings.[10] Surely if such an explicit line had been drawn, the language of Article 17 would now reflect it. Moreover, the debates indicate confusion among the delegates themselves as to the meaning of the rejection of the CITEJA draft. Minutes at 83-84.[11] We are, therefore, especially reluctant to draw conclusions which are not reflected in the work of a drafting committee that had the advantage of considering the debates contemporaneously.

The most that can be said is that the draftsmen rejected the concept of automatic liability (subject, of course,

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10. In 1929, the word "aerodrome" meant the entire airfield property on which there were several buildings used by passengers, as opposed to the single, large, air terminal building characteristic of major airports in this country today.

11. We do not find the debates as clear as the dissent indicates. Although the delegates agreed that "rejection of [Draft Article 20] led to acceptance of the opposite principle," it is unclear as to what that "opposite principle" was. In Day, supra, the Second Circuit concluded that the Convention had adopted the views of Prof. Georges Ripert of France -- the "dean of French writers on civil law" -- who "proposed that the article be recast in terms broad enough to allow the courts to take into account the facts of each case." 528 F. 2d at 34-35. In any event, it is clear from the final language of Article 17 that the strict Brazilian proposal, as articulated by the delegate from Great Britain, which would have limited the period of liability to the time when passengers were "on board the aircraft," was not adopted.

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to the defenses provided elsewhere in the Convention) for all accidents within the limits of the aerodrome. Our conclusion that under certain circumstances there may be liability for some accidents within a terminal building is not inconsistent with that intent. Furthermore, by analyzing this case, as we have, in light of the carrier's control over the passengers and the likelihood of injury by causes inherent in air transportation, we have accommodated the concerns of those who opposed the CITEJA draft without doing violence to the language of Article 17.[12] Cf. Shawcross & Beaumont, Air Law, at 441-42 (3d ed. 1966); Matte, Traité de Droit Aerien Aeronautique, at 404-05 (1964); Sullivan, supra.

Accordingly, the June 26, 1975, judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

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12. The debates indicate that the principal fear was that carriers would be liable for injuries sustained by passengers at times when the airline had no control over what the passengers were doing. As Prof. Georges Ripert of France stated:

> "There is real difficulty only for travellers, and this difficulty arises from the fact that the traveller has his independence . . . ."
> Minutes at 73.

Virtually all delegates agreed that there should be liability while the passengers were onboard the aircraft -- a period when the carrier had complete control over both the passengers and their environment.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Appendix A.

Constantine Evangelinos, et al. v. Trans World Airlines, Incorporated, No. 75-1990

SEITZ, Chief Judge, dissenting.

The majority holds that the defendant airline is strictly liable under Article 17 of the Warsaw Convention for the injuries which plaintiffs sustained within an airport terminal while waiting to board their flight, since those injuries occurred "in the course of ... the operations of embarking." I believe the majority's interpretation of Article 17 is unsupported by the relevant history of the treaty and with the exception of the Second Circuit's recent decision in Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3546 (U.S. March 30, 1976), is contrary to the decisions of courts in several signatory countries

In an attempt to define the scope of the rather imprecise language of Article 17, the majority rejects the "location test" advanced by TWA and adopts instead an "activity test" under which a passenger's activities are regarded as largely determinative of whether that passenger was engaged in the operations of embarking. The majority reasons that the "location test" could lead to inconsistent results based solely on the fortuity of where the injured passenger was stationed at the time of injury. I believe that both location and activity must be examined in order to determine whether a passenger's injuries were sustained during embarkation.

The starting point of my analysis is the policy underlying the enactment of the Warsaw Convention. As originally adopted, the Convention was designed to shield the infant airline industry from potentially crippling damage awards for injuries caused by risks inherent in air transportation. In order to accomplish this objective, the treaty restricted an airline's potential liability to approximately $8,300, in exchange for a presumption that the airline was liable if the accident took place on board the aircraft or during embarkation.

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Plaintiffs maintain that the signing of the Montreal Agreement in 1966 marked the rejection of the Convention's original goal and that the Convention, as modified by the Montreal Agreement, is now intended to afford protection solely to the passenger. While it is true that the Montreal Agreement increased the damage limitation to $75,000 and established a system of liability without fault,[1] the Agreement retained in toto the other provisions of the Convention, including Article 17. Thus, while the potential recovery of those previously covered by the Convention was significantly increased, the class of passengers entitled to the treaty's protection and the types of accidents on which liability could be based remained the same. I therefore believe that the Convention's original policy of limiting an airline's liability for personal injuries caused by the unique perils of air navigation retains its vitality, notwithstanding the adoption of the Montreal Agreement. While I am not unmindful of the strong interest in providing injured passengers with an adequate recovery, where their injuries are otherwise within the coverage of the Convention, I believe this goal has been accomplished through the increase of damage limitations and the elimination of the airline's "due care" defense.

The historical concern of the Convention drafters and delegates was with the unusual and grave risks which were then inherent in air travel. With this principle in mind, it is apparent that a passenger's location has a significant impact on the risks to which he is exposed. The farther a passenger is removed from the immediate vicinity of the

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1. It is significant to note that the United States was initially opposed to the principle of absolute liability since it viewed the fault requirement as a necessary protection for the growth of the airline industry. The subsequent retreat from this position occurred when the $100,000 liability limit which the United States advocated was rejected by the other signatories to the treaty. Following the defeat of this proposal, the effective denunciation of the treaty by the United States appeared imminent. The inclusion of a system of liability without fault which was designed to reduce litigation and to provide quicker settlements was therefore suggested as a compromise measure in order to ensure United States acceptance of the lower liability limits. Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967).

airplane itself, the less likely it is that he will be injured by any of the unique perils which accompany air travel.

Certain dangers, such as the danger of skyjacking, are encountered once the passenger has boarded the aircraft. Obviously, the threat of skyjacking is not a substantial risk borne by passengers within the terminal. Hence, while skyjacking has been loosely labeled as a risk associated with air travel, Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.Y. 1972), aff'd 485 F.2d 1240 (2d Cir. 1973), it is evident that such activity creates a risk only to those so situated as to be exposed to the danger.

Like skyjacking, sabotage or terrorist activity may pose a threat to passengers boarding or on board an aircraft. To this extent, I agree that terrorism is a risk which accompanies international air travel. I am unable to agree, however, that this particular hazard is an incidental risk of air travel when it occurs within the confines of an airport terminal. Rather, in my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank or other public place. Accordingly, I believe the majority's conclusion that plaintiffs were injured as a result of a risk inherent in modern air travel is unwarranted. The particular hazards of terrorism which are unique to air navigation are simply not risks to which passengers in plaintiffs' proximity were exposed.

The importance of a passenger's location as it relates to the risks of air travel is underscored by the case law of this country as well as that of other signatories to the treaty.[2] In the French case of Maché v. Air France, Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), aff'd Rev. Fr. Droit Arien 311 (Cour de Cassation 1970),

2. As the majority correctly notes, there is a substantial interest in uniformity of decision in this area. Block v. Compagnie National Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968). I do not believe, however, that the interest in uniform international interpretation of the treaty, adverted to in Block, compels us to follo the Second Circuit's decision in Day v. Trans World Airlines, supra, since that decision is inconsistent with prior decisions of United Sta courts and, more importantly, with a decision of the highest court in France. If deference is due in order to achieve international uniform ity, I believe we should respect the French interpretation of a treaty which was written and negotiated in the French language.

the highest court in France determined that the Warsaw Convention only governs accidents arising on the ground at locations of the airport where passengers are exposed to aviation risks. In that case a disembarking passenger was led by 2 flight attendants across the traffic apron toward the terminal building. Due to construction work, a detour was taken through a customs area which was not on the traffic apron. The passenger accidently stepped in a man-hole and was injured. In finding that the Warsaw Convention was inapplicable and did not restrict the passenger's potential recovery, the court ruled that the customs area in which plaintiff was injured was not an area exposed to risks of air navigation. Significantly, the court found that the only ground area where such risks were incurred was the traffic apron.

A case decided by the United States Court of Appeals for the First Circuit, MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971), also stresses the importance of a passenger's location in relation to the hazards of air travel. That case involved a 74 year old woman who mysteriously fell while awaiting her suitcase in the baggage area of an airport. The court affirmed a directed verdict in the defendant airline's favor on the ground that there was no basis for finding an "accident", the first requirement for invocation of the Convention. In any event, however, the court found that the injuries sustained by plaintiff did not occur during the operation of disembarking since that operation had "terminated by the time the passenger [had] descended from the plane by the use of whatever mechanical means [were] supplied and [had] reached a safe point inside of the terminal . . . ." 439 F.2d at 1405. The court reasoned that the Warsaw Convention was not intended to apply "to accidents which are far removed from the operation of aircraft." Id. at 1405.

A determination as to whether a passenger's injuries were sustained in an area exposed to the particular risks of air navigation is thus a necessary first step in deciding whether that passenger was

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injured during the course of the operations of embarking. Since I bdieve this threshold determination must be resolved against plaintiffs in this case, I would affirm the judgment of the district court. However, even assuming plaintiffs were injured at a location where the perils of air travel are logically encountered, I do not believe they were injured while in the course of the operations of embarking as required by Article 17. Rather, my reading of the Convention Minutes and the subsequent commentary on the treaty indicates that the delegates viewed the operations of embarking restrictively to include only the actual boarding of the airplane or, at best, the trip across the traffic apron from the terminal building to the plane. Under no circumstances were accidents inside the airport terminal regarded as within the scope of the treaty.

As the majority correctly observes, the present language of Article 17 resulted from the delegates' rejection of Article 20 of the CITEJA draft which would have imposed liability from the time of entry of the "aerodrome of departure" until the time of exit from the "aerodrome of arrival." During the debates on Article 20, several amendments were proposed to distinguish between the liability for carriage of passengers and that for transportation of goods. A representative example is the proposal by the delegate from Brazil which suggested that the language of Article 20 be amended:

> "to replace 'from the moment when travelers, goods and baggage enter the aerodrome of departure up to the moment when they leave the aerodrome of destination' by 'from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder'."

Minutes at 71.

The French Delegation would have amended Article 20 to limit the airlines' liability for injuries to travelers to those injuries

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sustained during the course of carriage. During the discussions which followed the various proposals, it became evident that there was considerable dissatisfaction among the delegates with the expansive provision for passenger liability embodied in Article 20 and a widespread feeling that the Article should be re-submitted to the Drafting Committee for revision.

Believing that important questions of substance rather than mere matters of re-wording were raised by the several proposed amendments, the delegate from Great Britain suggested that the Convention pass on the substantive issues before referring Article 20 to the Drafting Committee. He remarked as follows:

> "It seems to me that here there are questions of principle upon which one can pass before the referral to the drafting committee.
>
> "For example, as regards travelers, does liability begin, as it is said in the draft, upon the entrance into the aerodrome of departure, or does it begin when the traveler is on board the aircraft? Here is the divergence as it exists as regards the travelers: When must liability begin? Following the principle established in the draft of the Convention, or simply when the traveler is on board?
>
> "It's a question upon which I ask that one pass before the referral to the drafting committee."

Minutes at 80-81.

These sentiments were echoed by the Reporter for the preliminary draft who stated:

> "We should make a decision first of all on the carriage of travelers and then on the carriage of goods. The situation, in effect, can be different.
>
> "In the carriage of travelers, there is a double solution possible: either maintaining the text which would consist in engaging the liability of the carrier as soon as the passenger enters the aerodrome, or accepting the suggestion which was made which consists in saying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft.
>
> "I point out again that this last solution, practically, is not one at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger

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> [sic]
> can have steped on the step-up of the aircraft, the step-up which is not an actual part of the aircraft, and be injured by another aircraft.
>
> "Be that as it may, the proposal is very clear."

Minutes at 81.

The substantive question was then called to a vote.

So that there could be no doubt as to the precise question on which the delegates were voting, the delegate from Luxembourg emphasized that

> "before deciding to refer to the drafting committee, it is indispensable to vote in the sense of the proposals made by the British delegation, which discriminated very well between the various cases. When the conference will have made a decision on these points which will be submitted to a vote, then the drafting committee will be able to work in a useful manner."

Minutes at 82.

The Brazilian Delegation likewise reiterated:

> ". . . I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft."

Minutes at 82.

Thereafter, a vote was taken and the proposed draft of Article 20 was defeated. Following revision, the current Article 17 emerged from the Drafting Committee and was adopted.

The majority concludes that the debates indicate confusion among the delegates as to the meaning of the rejection of the CITEJA draft. I am unable to subscribe to this position in view of the overwhelming evidence to the contrary. The objections which were voiced to the CITEJA draft of Article 20 and the several amendments which were proposed during the debates all reflect a common desire on the part of those opposed to the draft Article to restrict a carrier's liability for personal injuries to injuries which occurred on board

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or while the passenger was embarking. Agreement with respect to this limitation among the delegates who were critical of the CITEJA draft was almost universal. Naturally, certain questions were raised as to whether this alternative proposal would cover injuries sustained "in the case of the aircraft which is still in the hanger, which is on the traffic apron, which is taxiing etc. . . ." Minutes at 77. Questions were also posed as to whether the proposal would cover a passenger injured on the stairway which leads to the interior of the aircraft. Minutes at 78, 81. None of the factual variations or hypothetical possibilities which were raised, however, even remotely suggested that the restrictive proposal might be construed to cover passengers within the terminal. To the contrary, it was in reaction to the imposition of liability under such circumstances that the proposal was conceived.

I therefore believe that in rejecting the CITEJA draft of Article 20, the delegates intended to signify their approval of a proposal which would limit an airline's liability for personal injuries to those injuries which occurred during flight or while the passenger was boarding. Their subsequent adoption of Article 17 must be viewed as an affirmance of this more restrictive concept of liability.

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It appears likely that the phrase "during the course of any of the operations of embarking" was inserted in order to make explicit that the Article covered the passenger who was on the stairway preparing to enter the airplane in addition to passengers who had already boarded.

If any confusion existed as to the scope of the terms "embarking" and "disembarking", it was limited to the question of whether the Convention embraced accidents which occurred while the passenger was physically proceeding from the terminal to the plane or whether it covered only mishaps during the actual physical process of boarding. At the Fifth International Congress on Air Navigation -- held only 1 year after the Warsaw Convention was drafted -- a leading expert on air travel, Mr. D. Goedhuis, presented a paper in which he summarized the prevailing interpretations of Article 17 as follows:

> "Further, art. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views viz: a) in a broad sense: i.e. the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, i.e.: the getting on board and the alightment only comprise the actual getting in and out of the aeroplane." D. Goedhuis, Observations Concerning Chapter 3 of the Convention of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne, 1-6 Septembre 1931 (The Hague 1931) at 1163-64.

While Mr. Goedhuis advocated amending Article 17 to reflect the broad interpretation of "embarking", he was opposed by others, including at least one delegate to the Warsaw conference itself, who argued that the narrow interpretation which confined liability to accidents occuring during the actual process of boarding, was the proper one.

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It is significant to note, however, that under either interpretation, the injuries suffered by plaintiffs in the instant case would be outside the scope of Article 17. I therefore conclude that plaintiffs were not injured in the course of "embarking" as that term was restrictively intended.

My conclusion is not altered by the modern theories of accident cost allocation on which the Second Circuit relies in part in Day v. Trans World Airlines, supra. The Second Circuit finds that a broad construction of Article 17 is appropriate since the airline is in the best position to distribute accident costs among all passengers and to assume preventative measures. While I do not question the soundness of these principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17. Had the signatories to the Convention wished to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense was eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement.

Having concluded that plaintiffs were injured at a location which was neither exposed to the hazards of air travel nor within the delegates' intended scope of coverage, I would ordinarily end my analysis. However, in view of the majority's emphasis on the activity in which plaintiffs were engaged at the time of injury, I feel compelled to state briefly my views as to the relevance of this factor and to address the majority's argument.

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An examination of an individual's activity is only necessary, I believe, once it has been determined that the individual was situated in the immediate vicinity of an airplane where the risks of air travel are logically encountered. Obviously, the physical activity of walking toward a plane on the traffic apron or ascending the stairway to the plane's interior is no different than the activity in which a passenger engages at numerous locations within an airport. The distinguishing feature, therefore, must be the location at which this activity is performed.

Location, while important in identifying the potential class of passengers entitled to recover, is nevertheless not conclusive as to whether an individual passenger was injured while engaged in the operation of embarking. Rather, the injured victim's conduct must also be scrutinized in order to determine whether, objectively viewed, his activities were within the scope of Article 17. Clearly, an individual who is injured at a dangerous location while on a lark of his own cannot be said to be "embarking" and should not be permitted to recover under the Convention. Only those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery.

Although conceding that plaintiffs had not completed the preliminary steps necessary to boarding their flight in that they had not been searched and had not departed from the search area to board the bus which would take them to their awaiting flight, the majority nevertheless concludes that by standing in line waiting to be searched, plaintiffs were engaged in the activity of embarking. It bases this conclusion on a finding that TWA had assumed control over the

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passengers and on its belief that terrorist attacks within an airport are inherent risks of modern air travel.

As previously noted, I do not adhere to the majority's view that terrorism within an airport is a unique peril of air navigation. Moreover, I question the relevance of this factor if, as the majority suggests, an analysis of the activity in which a passenger is engaged at the time of injury is to be largely controlling.

With respect to its assertion that TWA had assumed control over its passengers, the majority proves too much. It cannot be gainsaid that passengers who are actually boarding and even those who are proceeding from the terminal to the plane on the traffic apron are subject to the airline's authority. Control is therefore inherent under the more restrictive interpretation of Article 17 which I have proposed.

It is equally clear, however, that passengers at many locations within the terminal are also, to a large extent, under the control of the airline. The majority's control analysis is therefore, at best, imprecise. In apparent recognition of the over-inclusiveness of its control classification, the majority seeks to impose yet another restriction on the class of persons who are entitled to recover under Article 17, namely, membership in an identifiable group associated with a particular flight and located within a specific geographical area designated by the airline. In effect, however, this additional restriction elevates location -- a factor which the majority only nominally accepts -- to a position of critical importance. Control becomes a mere artifice to permit recovery within the terminal, yet under limited circumstances.

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I therefore conclude that the factors relied upon by the majority in support of its conclusion that plaintiffs were engaged in the activity of embarking are largely irrelevant. Since I believe that plaintiffs' location within the airport terminal precludes their recovery under Article 17, I would affirm the judgment of the district court.

Appendix B, Judgment, United States Court of Appeals for the Third Circuit.

United States Court of Appeals

for the Third Circuit

No. 75-1990

CONSTANTINE EVANGELINOS, CALLIOPPI EVANGELINOS, ERNA EVANGELINOS, STELLA EVANGELINOS and MARY JULIA EVANGELINOS,
Appellants

vs.

TRANS WORLD AIRLINES, INCORPORATED

(D.C. Civil No. 74-165)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, Chief Judge and VAN DUSEN and WEIS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgement of the said District Court, filed June 26, 1975, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Clerk

May 4, 1976

FFI—GS—3-30-72—1M—6139

No. 75-1354

In the Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC., PETITIONER

v.

ARISTEDES A. DAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States in this case.

QUESTION PRESENTED

The United States will discuss the question whether boarding procedures that take place within an air terminal building can constitute "operations of embarking" within the meaning of Article 17 of the Warsaw Convention.

STATEMENT

Respondents brought this action in the United States District Court for the Southern District of New York to recover damages from petitioner, an air carrier, for wrongful death and personal injuries. The deaths

and injuries resulted from an armed attack by terrorists on individuals who were standing in a line in Hellenikon Airport in Athens, Greece, preparing to board petitioner's Flight 881 to New York (Pet. App. B, p. 5).

1. The boarding procedure at Hellenikon Airport was described by the district court as follows (Pet. App. B, pp. 27-28):

> These passengers could not board the aircraft unless they:
>
> 1. presented their tickets to TWA at the checking desk on the upper level;
> 2. obtained boarding passes from TWA;
> 3. obtained baggage checks from TWA;
> 4. obtained an assigned seat number from TWA;
> 5. passed through passport and currency control imposed by the Greek Government;
> 6. submitted to a search of their persons for explosives and weapons by Greek police;
> 7. submitted their carry-on baggage for similar inspection by Greek police;
> 8. walked through Gate 4 to Olympic's bus;
> 9. boarded the bus;
> 10. rode in the bus a distance of 100 yards; and
> 11. walked off the bus and onto the aircraft.
>
> * * * * *

> When [the passengers] were injured they had completed five out of eleven steps [*i.e.*, had passed through passport and currency control].

The procedure between the fifth and sixth steps described above was as follows (Pet. App. B, p. 6):

> [After] [t]he passenger * * * passed through Greek passport and currency control * * * he descended a flight of stairs into the Transit Lounge. Only passengers waiting to board international flights were allowed inside the lounge area where they were required to remain until boarding. While the traveler waited for his flight to be called, he secured his seat assignment at the transfer desk located inside the lounge. When his flight was announced, he proceeded to the designated departure gate, where he and his hand baggage were searched by Greek policemen.

The attack in this case occurred after Flight 881 had been announced, when the passengers were standing in line at the departure gate waiting to be searched (*ibid.*).

2. Respondents moved for summary judgment on the issue of liability. They claimed that petitioner was absolutely liable under the Warsaw Convention, 49 Stat. 3000, T.S. 876, and the Montreal Agreement of 1966, Agreement CAB 18900, 31 Fed. Reg. 7302.[1] Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger,

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[1]Both the Convention and the Agreement are set forth at 49 U.S.C. 1502 note.

> if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

That liability was made absolute by the Montreal Agreement, except where contributory negligence is shown, to the extent of a maximum of $75,000 per passenger. See generally Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

The district court granted respondents' motion for summary judgment. The court concluded, on the basis of "the totality of the circumstances * * * viewed against the background of the plain meaning of the Convention, coupled with a consideration of its historical purpose" (Pet. App. B, p. 30), that the terrorists' attack had occurred "in the course of * * * the operations of embarking," within the meaning of Article 17 of the Convention.

The court of appeals affirmed, observing (Pet. App. B, pp. 8-9; footnote omitted):

> It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the "operations of embarking" commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were

> required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate, we are driven to the conclusion that the plaintiffs were "in the course of embarking."

DISCUSSION

In our view, boarding procedures that take place within an air terminal building can constitute "operations of embarking" within the meaning of Article 17 of the Warsaw Convention.[2] We believe that the contrary view espoused by petitioner, *i.e.*, that the phrase "operations of embarking" refers only to those boarding procedures that take place outside the physical confines of the air terminal building, would unjustifiably restrict the intended operation of the Convention and the subsequent Montreal Agreement.

The purpose of the Warsaw Convention, as its preamble states, is to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." In connection with the second of its two objectives, the uniform regulation of carrier liability, the Convention specifies, *inter alia*, the

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[2]There is no dispute that an attack by terrorists constitutes an "accident" within the meaning of Article 17. See *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y.), affirmed, 485 F. 2d 1240 (C.A. 2). Thus the only question here is whether that accident occurred during "the course of any of the operations of embarking."

circumstances under which a presumption of liability arises (Articles 17, 18, and 19), the defenses available to the carrier to rebut that presumption (Articles 20 and 21), and the maximum monetary liability per passenger (Articles 22 and 23). Article 17 provides a presumption of liability "if the accident which caused the [injury] took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The legislative history of the Convention is instructive as to the meaning of Article 17. The background was described by the court of appeals (Pet. App. B, p. 11; footnote omitted):

> The Warsaw Convention was the product of two international conferences, one held in Paris in 1925, and another in Warsaw in 1929. The Paris conference appointed a small committee of experts, the Comite Internationale Technique d'Experts Juridique Aeriens (CITEJA), to prepare a draft convention for consideration by the delegates at Warsaw. The version proposed by CITEJA would have extended accident coverage to passengers
>
> > from the time when [they] enter the airport of departure until the time when they exit from the airport of arrival.

At the Warsaw Conference, the delegates raised several objections to this version. Mr. Ambrosini of Italy asked whether the carrier should be presumed liable for all injuries incurred by passengers "within the limits of an aerodome" (Pet. App. E, p. 77). Mr. Pecanha of Brazil recommended that liability be presumed only "from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder" (Pet. App. E, p. 78). In this connection, Mr. Ripert of France suggested (Pet. App. E, p. 80):

> [H]ere one would be content to employ a general formula—"during air carriage"—in leaving to the courts the duty of deciding in each case if one is within the contract of carriage.

Mr. Pecanha's and Mr. Ripert's suggestions for a general formula relating the carrier's liability for passenger injuries to the moment of boarding or the commencement of the contract of carriage were treated by the delegates as being, in effect, one and the same. Mr. de Vos, the Reporter, questioned whether such a formula would not be either too restrictive or too vague (Pet. App. E, pp. 84, 88):

> As regards passengers, it is easy to say that the liability begins when the passenger has embarked. Does this suffice? There is the case of the aircraft which is still in the hanger [*sic*], which is on the traffic apron, which is taxiiing, etc. * * * .
>
> * * * * *
>
> [S]aying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft * * * is [no solution] at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped [*sic*] on the step-up of the aircraft, * * * and be injured by another aircraft.

Mr. Ripert answered such objections by pointing out that a formula based upon embarcation would not limit the presumption of liability to situations where the passenger had actually boarded the aircraft and that case-by-case adjudication of the scope of the presumption would be fairer than the rigid application of an arbitrary rule (Pet. App. E, p. 85):

> If [the passenger] puts his foot on the step of the stairway which leads to the interior of the aircraft, for example, the contract of carriage has commenced. It's a question of fact which the courts will have to resolve, and they are accustomed to resolving them.
>
> Why do you want, as regards air carriage, to have very precise formulae that don't exist in any other mode of carriage and which indicate when such carriage commences? The courts will decide if the carriage had commenced when the accident occured [*sic*].

The delegates then voted to reject the CITEJA proposal and to refer to the drafting committee the alternate proposal "that the liability of the carrier begins at the moment when the passenger embarks on the aircraft" (Pet. App. E, p. 90). The drafting committee subsequently prepared the present Article 17, which provides that the presumption of liability arises with respect to accidents occurring "on board the aircraft or in the course of any of the operations of embarking or disembarking." As so rewritten, Article 17 passed without further debate (Pet. App. E, p. 93).

This history clearly demonstrates that the delegates did not intend the presumption of Article 17 to cover all accidents to passengers within air terminals; such broad coverage was proposed by CITEJA and was specifically rejected. At the same time, as Mr. Ripert indicated with his example of the passenger who had only stepped onto the boarding ladder, the delegates did not intend to limit the presumption to situations where the passenger had physically entered the aircraft. Instead, the Conference adopted the intermediate position represented by Article 17—"in the course of any of the operations of embarking

or disembarking." It seems clear that, in doing so, the conference deliberately eschewed a bright-line test in favor of a more flexble formulation. Under that formulation, whether an activity constitutes "any of the operations of embarking" necessarily would be, as Mr. Ripert noted, "a question of fact which the courts will have to resolve" (Pet. App. E, p. 85).

It may well be that the delegates, or a majority of them, did not envision that "any of the operations of embarking" could take place within an air terminal. In using that phrase, undoubtedly they had in mind the boarding procedures that prevailed at the time—procedures that apparently entailed little more than walking across the traffic apron and mounting a ladder. But boarding procedures have changed enormously since 1929, and the words chosen by the delegates must be applied to circumstances different from any they could have imagined. The court of appeals correctly observed (Pet. App. B, p. 13):

> Justice Holmes's counsel concerning Contitutional construction, set forth in his opinion in *Missouri* v. *Holland*, 252 U.S. 416, 433 (1920), applies with equal force to the task of treaty interpretation:
>
> > [W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.

Moreover, the delegates did not intend to freeze into the language of the Convention a test of liability reflecting the then-existing techniques of embarcation. They did not, for example, specify that liability could attach only when the passenger emerged from the air terminal or

mounted the boarding ladder, although they could easily have done so. Instead, they chose a formulation broad enough to encompass changing conditions and to allow the relevance of specific facts to be considered on a case-by-case basis.

Accordingly, it seems plain that the arbitrary rule urged by petitioner, that liability can never attach until after the passenger has emerged from the air terminal, must be rejected. It has no basis in the language of the Convention, it is not supported by the legislative history, and it is not relevant to modern conditions. Today, a boarding passenger typically moves from a waiting room through a corridor into either an enclosed ramp or a mobile lounge, and from there into the interior of the aircraft, without ever being outdoors. In such circumstances, the passage beyond the structual confines of the air terminal building would appear to have nothing but symbolic significance, if that. Standing alone, it should not be determinative of when "the operations of embarking" have begun.

In short, we believe that the question whether an accident occurred "in the course of any of the operations of embarking" must turn upon a close analysis of the particular facts and not upon the bright-line test offered by petitioner.[3] The courts below adopted "a tripartite test

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[3]It may be that the delegates at the Warsaw Conference were content to leave imprecise the outer contours of the presumption of liability because of the availability of the defense of due care under Article 20 of the Convention. Sir Alfred Dennis of Great Britain observed (Pet. App. E, p. 83), "I don't think that we should linger on the question of damage sustained on the ground, because if damage is caused on the ground in an aerodrome by the aircraft of the carrier, we are within the ambit of the Convention; but if the damage is caused by the aircraft of another company, the carrier is not liable by the terms of the Convention, considering that he offers proof that he is not at fault." Similarly, Mr. de Vos, the Reporter, pointed out that the Convention establishes "[n]ot a definitive system of liability, but simply a presumption" (Pet. App. E, p. 84). Thus prior to the adoption of the Montreal Agreement, precise delimitation of the scope of the presumption was not a matter of major importance, except insofar as Article 22 limited a carrier's liability in circumstances where the presumption applied. In that Agreement, however, the carriers waived their defense of due care under Article 20, thereby making the presumption of liability irrebuttable. This was done without any amendment to Article 17. Apparently what petitioner seeks here is a judicial redefinition of Article 17, restricting the scope of the presumption under Article 17 in a manner that might accord with what the wishes of the delegates might have been had they contemplated a regime of absolute liability. But the carriers' voluntary waiver of defenses does not provide a legal basis for judicial revision of the operative terms of the treaty. See *MacDonald* v. *Air Canada*, 439 F. 2d 1402, 1405 note (C.A. 1).

based on activity (what the plaintiffs were doing), control (at whose direction) and location" (Pet. App. B, p. 8). These factors, together with timing, *i.e.*, the temporal proximity of the accident to scheduled boarding or actual deplaning, appear to us to be the appropriate ones to be considered. The objective of the Warsaw Conference in adopting Article 17 was to identify a zone within which the carrier could fairly be made to shoulder the principal responsibility of protecting against the risk of injury to passengers, *e.g.*, a zone within which a rebuttable presumption of liability would not be unreasonable. It is consistent with that objective to consider the factors of activity, control, location, and timing in giving content to the broad language of Article 17.

For example, the process of checking in at a ticket counter ordinarily would not appear to constitute an operation of embarking: although the activity is related to embarcation, and is conducted by the carrier, under most circumstances it would seem insufficiently proximate to

actual boarding, in either time or place, to warrant characterization as an operation of embarking. On the other hand, the process of presenting a boarding pass for inspection at the point of entering an enclosed ramp leading into the aircraft would appear to constitute an operation of embarking: that activity is closely related to actual boarding in function, time, and place, and it is carried out at the specific direction of the carrier.

Intermediate situations, such as the one presented in this case, are of course more difficult. We are uncertain what conclusion we would reach if the facts of this case were presented to us as a completely original matter. At a minimum, however, we cannot say that the result reached by the courts below is clearly wrong.[4] See also *Evangelinos* v. *Trans World Airlines, Inc.*, C.A. 3, No. 75-1990, decided May 4, 1976 (also finding liability on these facts), petition for rehearing *en banc* granted, June 3, 1976. Moreover, the correct application to specific facts of a test based upon the factors of activity, control, location, and timing would not appear to be a matter warranting review by this Court.

Nor does the decision below create a conflict that should be resolved by this Court. The court of appeals' decision is, of course, in harmony with the Third Circuit's subsequent decision in *Evangelinos* v. *Trans World Airlines, Inc., supra,* and it is consistent with the earlier de-

[4]We note, moreover, that the effect of the decision below may be to induce carriers to persuade air terminal authorities to conduct weapons searches at an earlier point in the boarding process than was done at Hellenikon Airport. Earlier searches would reduce the likelihood of attacks directed at the passengers of particular flights. In this case, for example, the attackers were members of an Arab terrorist group who had "planned to attack 'Israel immigrant passengers on TWA flights going to Tel Aviv but by mistake struck * * * passengers * * * boarding the New York bound flight' " (Pet. App. B, p. 23).

cision of the First Circuit in *Mac Donald* v. *Air Canada*, 439 F. 2d 1402. In the latter case, the plaintiff had sustained an injury when she fell in the baggage claim area of an air terminal, the court held that the evidence was insufficient to establish that the fall was an "accident" within the meaning of Article 17 (439 F. 2d at 1404-1405) and that, in the alternative, the fall had not occurred during any of the operations of disembarking (439 F. 2d at 1405). The court reached the latter conclusion on the ground that the plaintiff had "reached a safe point inside of the terminal" (*ibid.*), where she was "far removed from the operation of aircraft" (*ibid.*). It seems likely that the court of appeals below would have reached the same result on those facts: although the activity of retrieving baggage is related to the process of disembarking, it is not normally performed subject to the specific direction of the carrier, and it ordinarily is removed both in time and place from the actual deplaning.[5]

Petitioner asserts (Pet. 8) that the decision below is "in direct conflict" with *Mache* v. *Air France*, Rev. Fr. Droit Aerien 311 (Cour de Cassation 1970). In that case, a passenger had been injured by falling into a water drain as he followed one of the carrier's agents across an outdoor customs area after leaving the aircraft. The lower court held that the accident had occurred in the course of the operations of disembarking and therefore that the carrier's liability was limited to 125,000 gold francs by Article 22

[5]Moreover, the First Circuit in *MacDonald* appeared to reject the contention made by petitioner here that the carrier is never liable under the Convention for accidents occurring within the air terminal. The court recognized that the question when the operations of disembarking have terminated must be answered not by reference to arbitrary rules but rather on the basis of the specific facts of a particular case; it concluded its opinion by observing that "[w]ithout determining where the exact line occurs, it had been crossed in the case at bar" (439 F. 2d at 1405).

of the Convention. The passenger appealed, contending that the operations of embarking had terminated before the accident took place and that therefore the carrier's liability was not limited. The Cour de Cassation affirmed. It found the lower court's reasoning to be "inexact" (Pet. App. D, p. 64), stating (Pet. App. D, p. 62):

> [I]f the Warsaw Convention regulates, in effect, accidents arising on the ground, in the course of the operations of embarking or of disembarking, it is only to the extent that these operations are taking place on the traffic apron * * *.

But the court affirmed on the ground that the carrier's liability nevertheless was limited by the specific terms of its contract of carriage to 125,000 gold francs. Thus, while the French court's opinion takes a more restrictive view of the scope of Article 17 than that taken by the court of appeals below, since that view appears to have been in the nature of *dictum*, the extent to which it will be adhered to in future cases may be a matter of some doubt.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

SEPTEMBER 1976.

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[6] In any event, although international uniformity of construction is to be desired, especially since such uniformity was the purpose of the Convention, for the reasons stated above (pp. 5-12, *supra*), the court of appeals did not err in refusing to adopt the French court's restrictive reading of Article 17. United States courts need not defer to the decisions of foreign courts when to do so would achieve uniformity only at the cost of misconstruction.